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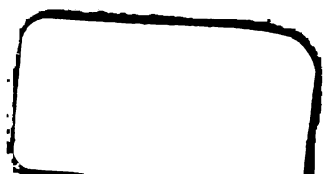
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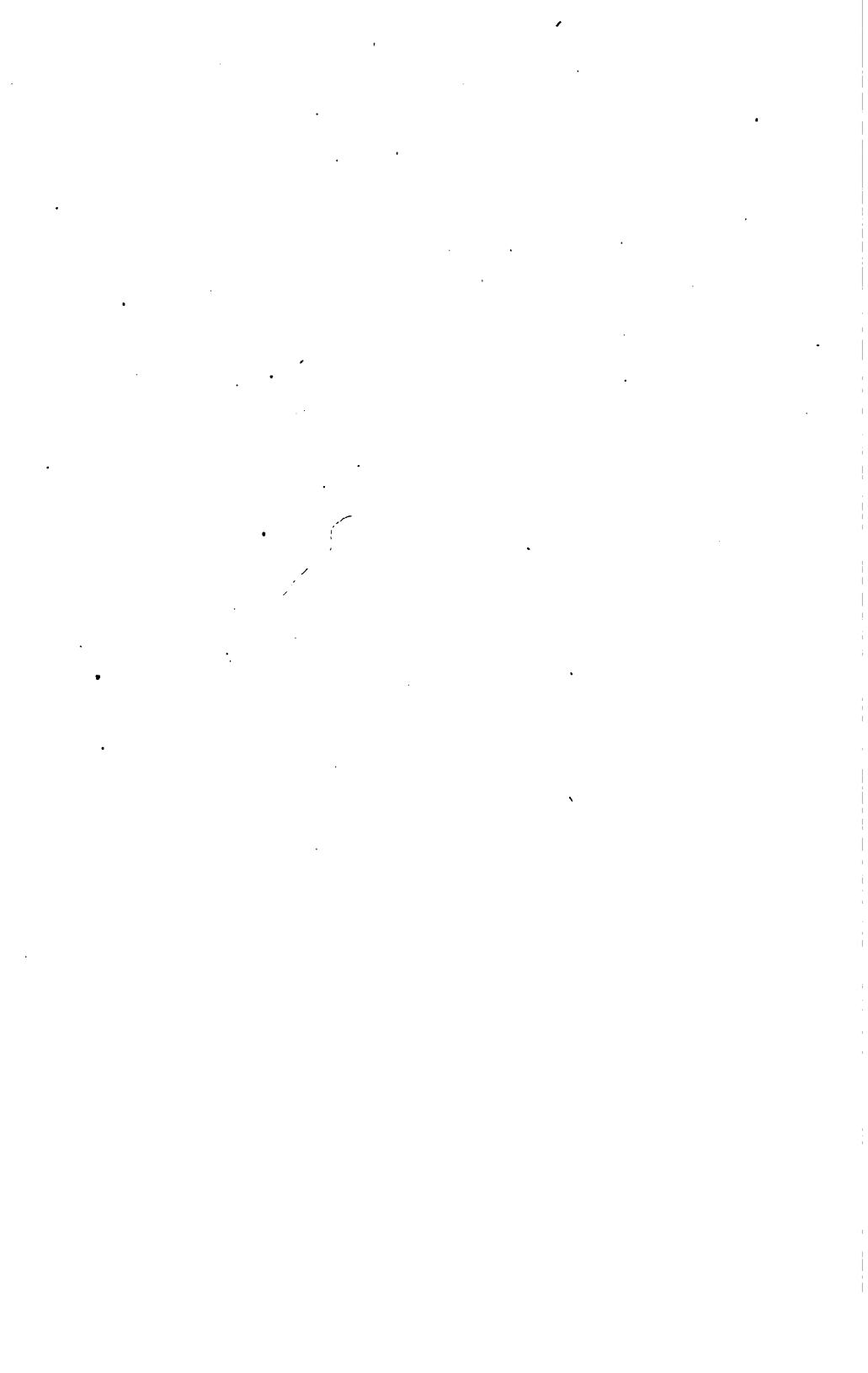
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EASTERN LAW REPORTER CANADA

CONTAINING JUDGMENTS OF THE COURTS

—OF—

NOVA SCOTIA, NEW BRUNSWICK

AND

PRINCE EDWARD ISLAND

ALSO CASES OF GENERAL INTEREST IN QUEBEC

VOLUME V.

EDITOR:
CHARLES MORSE, D.C.L.

TORONTO:
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1908

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VOL. V. TORONTO, MAY 20, 1908. No. 1

SUPREME COURT. MARCH 23RD, 1908.

INVERNESS RAILWAY & COAL CO. v. SIR ALFRED JONES.

Coram, FITZPATRICK, C.J., GIROUARD, DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

Appeal from judgment of the Court of King's Bench,
Appeal side.

THE CHIEF JUSTICE concurred in the opinion stated by
MACLENNAN, J.

GIROUARD, J. (dissenting):—The facts of this case are not in dispute. We are called upon to decide two questions of law. First, what is the meaning of the words "last voyage" used in paragraph 5 of Art. 2383 of the Civil Code? And second, who is the dernier équipier within the meaning of Arts. 931 and 983 of the Code of Civil Procedure?

Art. 2383 reads as follows:—

“There is a privilege upon vessels for the payment of the following debts:—

"5. The sum due for repairing and furnishing the ship on her last voyage, 'pour son dernier voyage,' according to French text."

This article is borrowed from the *Ordonnances de la Marine* of 1681 and from the common law of France as it existed at that time. See Art. 18, tit. XIV., liv. 1, as explained by Valin in his *Commentaries* on this ordinance, pages 397 and following. Edition Becane.

The framers of the Quebec Code express some doubt as to that ordinance, and also the ordinance of commerce of 1673, having ever been in force in Canada for want of registration

by the Superior Council, and it may be added that such has been the general impression among Quebec jurists for many years. This registration was a prerogative of the Parliaments of France, recognized by the Sovereign himself, so that his laws would receive some sort of popular sanction. Decl. 7th July, 1572, 14 Isambert, *Anciennes lois françaises*, p. 252; and the Judicial Committee of the Privy Council has declared on several occasions that it was extended to the Superior Council of Quebec. *Hutchinson v. Gillespie* (1844), 4 Moore 378; *Symes v. Cuvillier* (1879), 5 App. Cas. 138. In view of documents recently made public, more particularly *Jugements et Deliberations du Conseil Supérieur*, published by the Government of Quebec in 1885-1891, that doubt cannot any longer be entertained. This collection, forming six immense volumes, is most valuable, but unfortunately it is without index and unfinished. I had to spend several days to peruse the two last ones to obtain the information I desired. These volumes were stopped at the year 1716, and it is impossible to ascertain the jurisprudence of the council from that date till the *Précédents* of Perrault, commencing in 1727. I am convinced that, if this collection was completed at least to Perrault's *Précédents* and a proper index made, more important information would be of easy reach on the laws of Quebec generally under the French régime, and more particularly on the subject before us.

It is true that the sheet or sheets of registration of said ordinances cannot be found, but it is a well known fact that they are not the only ones missing. Too often they were not recorded in a bound register or book, and were kept loose. To quote one or two instances, how is it that the commission of one of the Judges in Admiralty, le *Sieur Boucault*, "lieutenant général de l'Amirauté de Quebec," is not in the third volume of the revised edition of *Edits et Ordonnances*, published in 1854 by the Government of the late Province of Canada, which is supposed to contain all the commissions of the officers of justice. The commission of *Couillard de l'Espinay*, the first Judge, is there, pp. 94 and 95; likewise that of the last Judge, le *Sieur Guillemain*; but that of his predecessor, *Boucault*, is missing. The Archives of the *Jurisdiction Royale* of Montreal disclose a still more flagrant example of carelessness and looseness in the keeping of the archives of the Council. In the first report of the Provincial Secretary of Quebec for 1886-87, Division of the Registrar, p. 54, the proof is made that an important règlement or

statute of the Council of the 5th May, 1727, concerning the keeping of registers of civil status, in 13 sheets and 12 articles, was passed for the whole Government of Canada. It is on file in the greffe of the Royal Court of Montreal, but it is not to be found in the Edits et Ordonnances which are represented to contain all the reglements of the council. Why? Simply because it had been mislaid, and this in violation of the arrêt of the 28th February, 1664, passed one year after the establishment of the Council, which provided for the keeping of a plumitif or register where the arrêts et ordonnances of the Council should be transcribed "et non en feuille volante" (2 éd. et ord. 15). It is remarkable that this regulation, which no doubt applied to the acceptance or registration by the Council of the King's Edits et Ordonnances, did not extend, at least expressly, to the transcription of the text of these statutes. Later on, a few years before the cession, the King and the Council made some enactments concerning the registration of said statutes, which will be found at pages 224 and 481, but nothing is said as to the manner of making the registration.

If the Ordinances of 1673 and 1681 were not law in Canada, how can we explain the fact that all the Courts, including the Superior Council, followed them as law? We find in Perrault's *Précédents du Conseil*, p. 16, a decision relating to a bill of exchange, where undoubtedly the Ordinance or Code of Commerce of 1673 is quoted as law. Perrault, an advocate and prothonotary of the King's Bench in Quebec for many years, and who had personally known many praticiens under the old French Régime (he was born in 1753) observes in his *Précédents de la Prévosté de Quebec* that that Ordinance was one of the fundamental laws of the Canadian Courts. (See also p. 26). On the 19th September, 1712, and consequently before the creation of the Quebec Admiralty Court, at an extraordinary sitting of the Superior Council, reported in the 6th volume of the *Jugements et Délibérations*, p. 504, reference is made to the *Ordonnance de la Marine* as being in force in *La Nouvelle France*, and also to the "*Grefe d'Amirauté*," which must have been a branch of the *Prévosté* or ordinary civil tribunal of the town of Quebec.

Are not these declarations made not only by inferior Courts, but also by the very body who could declare whether these laws of national importance should be in force or not,

equivalent to registration? I believe that it is the only conclusion we can arrive at.

But if any doubt be possible, it disappears in face of the King's Reglement of the 12th January, 1717, registered the same year by the Superior Council: Edits et Ord. vol. 1, p. 358. His Majesty does not complain that the ordinance was not registered. He supposes it had been, for he represents that the ordinance had not been put fully into operation, because Admiralty Courts had not been established in the colonies of America, and provides for the creation of such Courts.

Art. 1 says: "il y aura l'avenir dans tous les ports des isles et colonies francoises, en quelque partie du monde qu'elles soient situées, des juges pour connoitre des causes maritimes, sous le nom d'officier d'amirauté, privativement à tous autres juges, et pour être par eux les dites causes jugées suivant l'ordonnance 1681 et règlements touchant la marine."

This Admiralty Court was organized in Quebec in 1717. (See Edits et Ordonnances, vol. 3, p. 94). I find in Perreault, Prévosté de Québec, p. 48, an arrêt of the 4th December, 1737, dismissing an action and ordering the parties to proceed elsewhere, "attendu que le fait dont il s'agit est un fait maritime." But it must be observed that the ordinance of 1681, title 2, art. 1, and the reglement of 1717 quoted above, gave exclusive jurisdiction to Admiralty Courts in maritime cases. Likewise under the French Code de Commerce, arts. 631, 633, the jurisdiction of the tribunaux de commerce, which have replaced Admiralty Courts, has been held to be exclusive, although the word is not used.

This digression is not only interesting from an historical point of view; it is not without practical importance in the determination of marine cases, for whenever the Civil Code of Quebec has no provision upon any maritime matter, recourse can be had to the ordinance of 1681 and other French laws in force in the Parliament of Paris at the time of the creation of the Superior Council in 1663, or registered by the Council if enacted after its creation: C. C. Art. 2613.

After the cession of the country to Great Britain, the ordinance and the French law generally ceased to be enforced in the Quebec Admiralty Court, and the English law was substituted for them as part of the public law of Great Britain. By his commission, the first Admiralty Judge in Quebec, appointed in 1764, was empowered to hold a Vice-Admiralty Court like the High Court of Admiralty in Eng-

land, and, of course, according to the English laws. The Civil Code of Quebec, Art. 2383, recognized that rule in express terms:—

“The provisions in this chapter (chapter 4th relating to privilege and maritime lien) do not apply in cases before the Court of Vice-Admiralty.

“Cases in that Court are determined according to the civil and maritime laws of England.”

Finally, the Imperial Statute, 53-54 Vic. ch. 27, passed in 1890, empowering the legislature of a British possession to create Colonial Courts of Admiralty, declares that the jurisdiction of such Courts shall be “as the admiralty jurisdiction of the High Court in England.”

For many years, ever since the cession, until the organization of Colonial Courts of Admiralty by virtue of the said Imperial statute and the Canadian statute in pursuance thereof there was only one Admiralty Court in Lower Canada, and that was the Quebec Vice-Admiralty Court, having jurisdiction only over tidal waters. Under the new statutes, Admiralty Courts have been established all over Canada and the navigable waters thereof, whether tidal or non-tidal, but it is remarkable that their jurisdiction is not exclusive, at least expressly. It may be so impliedly, a point we are not called upon to decide. In the United States it is now well settled, after some years of hesitation and uncertainty, that admiralty jurisdiction is exclusive, although some of the States, for instance, Louisiana, have special laws like those of Quebec, governing the subject matter, and this, in spite of the following saving clause in the constitution: “saving to suitors in all cases the rights of a common law remedy where the common law is competent to give it.” *Berwin v. Steamship Matanzas*, 19 La. Annual, 384. Strong grounds of public policy may be advanced against the maintenance of concurrent jurisdiction. It may be said that it is of national importance to the British Empire that British ships, whether owned or registered in the British Isles or the colonies, carrying the same flag, shall be governed by the same laws. But Parliament alone can so decree either expressly or impliedly. Whatever may be the rule of law in this respect, concurrent jurisdiction of ordinary courts in maritime matters, provided for by the French laws, has been so long exercised and recognized by the jurisprudence of Quebec from the cession to the present date, that I would hesitate to disturb it, especially as the point has not been taken either in

the Courts below or in this Court. Therefore, in arriving at the conclusion I have reached upon the two points of law submitted for our decision, I have taken for granted that the case was properly before the Courts below and this Court, and is governed by Quebec law, a point which was, moreover, conceded by the respondent's counsel at the hearing before us.

What is therefore the meaning of the words "last voyage," within Art. 2383, par. 5, of the Civil Code?

The trial Judge, Dunlop, J., who is also a Judge in Admiralty, after delivering a very elaborate opinion, gave judgment in favour of the appellants, and held that the "last voyage" means the round trip, or when the ship was last in the port of Montreal, as she intended to return to Montreal, and did in fact return within about one month. In appeal this judgment was reversed by all the Judges who expressed the view that the "last voyage" means the return voyage only, or the voyage from Rotterdam to Montreal, and that the supplies having been furnished on the previous voyage, that is, the voyage from Montreal to Rotterdam, the privilege existed no longer. It must be remarked that the case was not argued and was only submitted on the *factums*.

The respondent's counsel urged, both at the hearing before us and in his *factum*, that the appellants could only enforce their privilege by seizure of the coal before departure, and of the ship at the port of destination in Europe. I must confess that I cannot conceive that that could be the intention of the legislature. That privilege was given not only to secure to our own people the payment of necessaries for a ship, but also to give the credit she may need. It would be illusory for a master to get supplies, if the latter be exposed to be revendicated before the voyage commenced. And is it not extraordinary to suppose that a merchant who has advanced necessaries, as in this case, to enable a ship to proceed to sea, cannot enforce any privilege he may have unless he enforces it either before departure or at the European port? In this case, that port was within easy reach. But suppose the port of destination was unknown or distant in Asia or Australia, can it be expected that this coal merchant will be obliged to follow the ship by cable, correspondence or otherwise to maintain his privilege upon her? Will that privilege be recognized in foreign Courts? Will the local privileges be preferred? I think this situation is too absurd to be well founded. The privilege upon the ship, it is obvi-

ous, has been created not only in favour of commerce and navigation, but also to protect our own merchants, and the "last voyage" must mean the last trip she made from the port of Montreal, as held by the trial Judge. We are bound to give to our statutes—and the Quebec Code is a statute adopted by the late province of Canada before Confederation—such interpretation as will fulfil the intentions of the legislature and will give them effect.

The words "last voyage," to be found in several paragraphs of Art. 2383, has not always the same meaning, because the circumstances are not the same. A seaman, for instance, runs no risk, because he follows the ship and is always in a position to enforce his rights. Chief Justice Lacoste admits that the words have a different meaning, but he holds, and the whole Court with him, that in this case the "last voyage" means the voyage from Rotterdam to Montreal.

It is perhaps impossible to lay down an absolute definition of what may be the last voyage. When a ship has no regular service to perform, a tramp for instance, her last voyage may perhaps mean her last trip from the port of sailing, but when the ship belongs to a regular line as in this case, between Canadian ports and European ports and return, offering return passage, surely when that ship leaves the port of Montreal with a view of returning, and in fact returning regularly, it cannot be said that the voyage is only for one crossing and not also for the return crossing. It is not necessary to say more for the purposes of this case. The Code nor the Ordinance does not define the last voyage. It is undoubtedly more a question of fact, or rather of intention, than of law. The very recent decision of the House of Lords in *Board of Trade v. Baxter*, July, 1907, A. C. 376, supports this view.

It cannot be said that the jurisprudence of Quebec is well settled. I know only of two decisions, *Henn v. Kennedy*, 17 Que. L. R. 245, decided by Mr. Justice Routhier, in 1890, and adopted by Chief Justice Lacoste, and the other one, *McLea v. Holman*, decided by Mr. Justice Pagnuelo, in 1892, and reported in Que. L. R. 2 S. C. p. 105, and followed in this case by Mr. Justice Dunlop.

Mr. Justice Pagnuelo has examined very fully the authorities, and I cannot add anything to what he says on the subject. I refer, therefore, to his elaborate opinion, and also to the authorities quoted by the appellant's counsel in his

factum. For the moment I will content myself with quoting the following passage from Mr. Justice Pagnuelo, in which I concur:—

“ Il faut en cette matière, comme en toute autre, rechercher l'esprit de la loi et l'interpréter de manière à lui donner effect, en protégeant, d'une manière efficace, ceux que la loi a voulu protéger.

“ Le maître d'un navire qui le fait réparer ou l'approvisionne à crédit avant de faire un voyage, n'agit ainsi que parce qu'il n'a pas l'argent pour payer. La loi accorde un privilège pour les réparations faites ou les provisions fournies pour le dernier voyage. Si la course que le vaisseau doit faire, disons de Montréal à Liverpool, doit être considérée comme constituant et complétant le dernier voyage à l'égard de celui qui a fait les réparations ou fourni les provisions à Montréal, il lui faudra suivre le vaisseau à Liverpool et l'y saisir avant qu'il ne parte de Montréal. En effet du moment que le navire laisserait le port de Liverpool pour naviguer durant l'hiver entre les ports de l'Europe ou de l'Amérique, le créancier de Montréal perdrait son privilège sur le navire; il lui faudrait donc suivre le navire en Angleterre pour le faire saisir, ou le saisir à Montréal avant son départ. Ce sont deux alternatives que rendraient impossible au maître du navire de faire réparer son vaisseau, ou de le faire approvisionner, s'il lui fallait payer avant de partir ou si le vaisseau était saisi avant son départ.

“ Le Législateur l'a entendu autrement; il a voulu que le navire put être réparé ou approvisionné à crédit lorsque le maître n'a pas d'argent pour payer et la loi accorde au fournisseur un privilège sur le navire pour ses avances. Exiger qu'il suive le vaisseau en pays étranger pour l'y faire saisir sous peine de perdre son privilège, c'est aller contre l'esprit de la loi et rendre impossible ce qu'elle a voulu favoriser.

“ Les mots voyage et dernier voyage sont employés plusieurs fois par notre code civil et par l'ordonnance de la marine. On se tromperait en leur donnant dans tous les cas la même portée, la même signification.

“ Lorsque le code parle du privilège pour les gages et loyers du maître et de l'équipage pour le dernier voyage (art. 2383, 4 Ord. de la Marine, liv. 1, titre XIV., art. 16) des sommes dues pour réparer le bâtiment et l'approvisionner pour son dernier voyage (id. 5) de la prime d'assurance sur le navire pour le dernier voyage (id. 7) du cas où le navire pour le dernier voyage (id. 7) de la prescription

pour les gages des matelots, qui ne commence à courir qu'après le parachevement du voyage (art. 2406); et des prêts à la grosse, soit sur le bâtiment ou sur les marchandises, faits pour le dernier voyage, lesquels sont préférés à ceux faits pour le voyage précédent (art. 2605), il n'entend pas toujours la même chose par le mot voyage et dans chaque cas l'on doit interpréter la loi de manière à assurer à chacun le privilège qu'il a voulu conférer. C'est se tromper que de vouloir donner au mot voyage la même signification dans tous les cas comme il a été fait dans la cause de *Henn v. Kennedy*."

As to the other reasons advanced by Mr. Justice Bossé, Chief Justice Lacoste has answered them to the satisfaction of the majority of his Court and to mine also. It is not necessary that the coal should have been ordered by a captain appointed by the real owners. The article of the Code makes no distinction whatever, whether the captain is the agent of the real owner or of the charterer, a British or a Quebec ship, navigating Quebec or interprovincial waters, the high seas or foreign waters. It is sufficient that the coal was put on board the steamer and used there; a legal privilege or lien is granted if the coal has been for the last voyage, and is enforced before another voyage is undertaken from the Quebec ports.

Under Art. 2391 of the Civil Code, the charterer in a case like this is supposed to be the owner for the time being, and to be responsible as such owner to third parties. Article 2397 does not apply. Here the coal was ordered by the gerant du bâtiment and the reputed owners, that is the charterers and their agent in Montreal having the sole control of the ship.

That is all I have to say about the first item of the claim of the appellants. They have a privilege for the payment of the same which they can enforce by a conservatory process as they have done under Art. 955 of the Code of Procedure. They might have had recourse to the saisie-arêt of Art. 931, if they had attached the steamer on her arrival in the port of Montreal; but instead of doing this, they delivered more coal and thereby became dernier équipier for that last delivery, remaining privileged creditors for the first one, being merely entitled to be paid by preference, as long as another voyage is not commenced. It is a lien of temporary duration unknown, I believe, to the English law, and under the Ordonnance de la Marine is subject to a prescription of one year. For the first supply they invoke the conservatory process of

Art. 955. The trial Judge found the procedure correct; no objection was taken against it. I believe none can be raised and judgment should go for plaintiffs to the extent of the first supply at least.

With regard to the second delivery of coal delivered after the return voyage to Montreal and before the departure of the "Lake Simcoe" on her next crossing, which the appellants claim à titre de dernier équipeur under Arts. 931 and 933 of the Code of Civil Procedure, I think they are likewise entitled to judgment in their favour.

One would naturally ask here, who is the dernier équipeur? No mention is made of him in any of the French ordinances, law dictionaries or books. He must have an exceptional position and a peculiar meaning, for whenever he appears in the statutes of Canada or Quebec, from the year 1787 to the present time, our legislature, even when using the English language, calls him by his French name only. Sir Alexander Lacoste, C.J., looks upon him almost like a ghost conjured up to frighten navigators and craft owners: "Quel est," he asks, "ce personnage mystérieux que l'on appelle le dernier équipeur, qui a traversé les siècles et que personne ne semble avoir décrit avec précision?"

Mr. Justice Stuart remarks in the case of *Plante v. Clarke*, 17 L. C. R. 76, that it has been thought by some that the words "dernier équipeur" means the person who formerly equipped voyageurs going to the Indian country. That is perfectly correct. The origin of the dernier équipeur is purely Canadian. For nearly 150 years he was a most important factor in the trade of Canada. He was no less a personage than the merchant who, in Montreal and elsewhere, had last outfitted on credit the canoes of the voyageurs, coureurs des bois and traiteurs dealing with the Indians of the far west. It was always understood that the suppliers would be paid out of the furs which these adventurers would take down in return for their goods. The voyageurs were not always scrupulous, and not unfrequently disposed of their loads on the way down, especially at the posts on the lake of Two Mountains, at Carillon, Oka, Ile aux Tourtes, Ile Perrot, and Ste. Anne's, where a very large trade was illegally carried on at various times during the French regime: (6 Juge et Del. 456; Canadian Archives, Cor. Gen. XXII. 319). In such emergency cases, the outfitter could resort to a saisie-arêt before judgment, even in the hands of third parties. I recognize one of these cases in Perrault's Precedents of the

Prévosté, p. 59, where one d'Ailleboust de Coulonge was allowed to be paid by privilege out of certain furs seized in the hands of a third party. There is another case reported in vol. 5 of the Jugements et Deliberations, pp. 927, 930, where a similar provision was made by the Superior Council in favour of Trottier des Rousseaux, also a merchant and siegnior of Ile Perrot.

In vol. 3 of La Collection des Manuscrits, p. 171, special mention is made of certain regulations adopted by the Government of Canada against "les voyageurs et équipieurs de Montréal," to prevent them from purchasing in the New England colonies the goods that they require "pour faire leur traits et leurs équipements."

On the 14th November, 1685, Governor de Denonville informs the Minister in Paris that Berthé de Chailly, a notorious merchant of Ste. Anne's, had left the country for France, after having amassed a fortune of 40,000 livres, too often by means of various frauds and especially by intercepting part of the pelleteries of canoes which the voyageur "devait apporter toutes au marchand qui l'a équipé:" (Canadian Archives, Cor. Gen. VII. 666, VIII. 18).

These attachments before judgment were easily obtained. No affidavit was required and it was sufficient for the plaintiff to mention his indebtedness. In the early days of the colony, it was not even necessary that the title upon which he relied should be authentic. It was sufficient that the debt was claire et liquide and exigible or that the debtor was insolvent. Pigeau, Procedure Civile, V. 1, pp. 121, 122, refers to a certain practice which, he says, was sanctioned par l'usage, and often made more easy, even in France, the recourse by saisie-arrêt before judgment, especially in cases of insolvency. Insolvency was almost the normal condition of these voyageurs.

In the year 1734, the Superior Council of Quebec put an end to attachments based only upon instruments under hand, and required authentic deeds or an order of the Judge authorizing the seizure, "à peine de nullité," Perrault, Conseil Supérieur, p. 22.

This mode of procedure continued until 1787, when the legislature introduced the English practice by 27 Geo. III. c. 4, s. 10, and for the first time required the affidavit which has been de rigueur ever since, except in the case of dernier équipieur suivant l'usage du pays. The same enactments have been made by the legislature from time to time, first in the old Revised Statutes of Lower Canada of 1845, next in

the Consolidated Statutes of 1860, then in the Code of Civil Procedure of 1867, and finally in the Revised Statutes of Quebec of 1888, and the new Code of Civil Procedure of 1897, which provides by article 933 for an affidavit disclosing "the existence of the required indebtedness."

Thus it appears that, although the days of canoes and bateaux have gone long ago and new modes of transportation and commerce have been devised, the last *équipieur* is still in the mind of our legislature. Who is he under these recent statutes? He is the butcher, baker, grocer, coal merchant, and other suppliers of necessities for the voyage. He is exactly what the word implies, what he always has been, that is the last outfitter of a vessel for the purposes of navigation in contemplation. "*Equiper, equipment, équipieur,*" says Hartfield in his dictionary of the French language, "*c'est pour voir une embarcation de tout ce qui est nécessaire pour la manoeuvre et pour la subsistance des hommes embarqués.*" In other words, the last *équipieur* is the last outfitter of the vessel, the one who has advanced last. He is not the supplier for the last voyage which he has allowed to terminate without taking any proceedings, he even making fresh advances.

Our Law Reports contain many precedents where the exceptional rights of the *dernier équipieur* have been considered. They will be found collected in Martineau's Code of Procedure, art. 931, pars. 8, 9, 10; art. 955, pars. 8 and following. In this case the affidavit required in all other cases that the defendant is about to secrete or abscond, etc., is not necessary, for it is sufficient to relate the existence of the required indebtedness as prescribed by art. 933.

The Court of Appeals rejected the contention of the respondents that, as they were not personally liable for the last delivery of coal, their ship could not be attached in payment of the same under art. 931, C. C. P. They held that the other defendants were personally liable, and that this was sufficient, as for the time being they were the reputed owners and under art. 385 C. C., ships are movable. Chief Justice Lacoste said: *Nous avons une dette personnelle contractée par le locataire, qui est défendeur; ceci satisfait aux exigences de l'article.*"

The only objection the learned Judges have as to the issue of the writ of *saisie arrêt* under art. 931 was, that the last *équipieur* has no privilege. With due respect I believe this is a misconception of his position. Whether he has a *lien*

or not, art. 931 gives him a remedy which he can exercise, whether finally he is paid his debt or not. He has a right to demand that the vessel, or at least the coal, be sold in satisfaction of his debt, of course after the payment of the hypothecs and privileged claims. The question of privilege will present itself after the sale, at the time of the distribution of the moneys. Is he *dernier équipéur*? That is the whole question. Every privileged creditor on a vessel, even a sailor, is not entitled to a *saisie-arrêt* under art. 931; he must be *dernier équipéur*, as was decided by several learned Judges familiar with ancient practice: *Delisle v. Lécuyer*, decided by *Berthelot, Mackay and Terrance, JJ.*, 15 L. C. J. 262, and *Dagenais v. Douglas*, 16 L. C. J. 109, decided by *Mondelet, Mackay and Caron, JJ.*

But is it so clear that the *dernier équipéur* has no lien or privilege? He may have none under art. 2383 C. C., although the point is not very clear in face of par. 3. But is it necessary to go that far? Is he not entitled to a privilege under the ordinance of 1881, liv. 1, tit. XIV., which was law before the Code? “*Ceux qui aurent prêté pour radoub, victuailles et équipement avant le départ.*” Can a privilege exist without express language? Can it be created by implication? Under arts. 191 and 192 of the French Code of Commerce, the negative seems to be the prevailing doctrine: See *Bédarride*, 1 Dr. Mar. Nn. 51, 52, 53. But are they not more restrictive than the ordinance liv. 1, tit. XIV., arts. 16 and 17, or the Quebec Code, arts. 2383 to 2386? The latter article refers to “other privileged debts, according to the circumstances under which the claim has arisen and the usage of trade.” The old French jurisprudence was well settled that the ordinance was not exclusive and that the privileges of the common law continued to exist, when not inconsistent. *Emérigon* in his treatise, *Assurances et Contrats à la grosse*, observes, p. 571:—

“*L’ordonnance, art. 16, titre de la saisie, place au troisième rang ceux qui aurent prêté pour radoub, victuailles et équipement avant le départ.*”

“*En 1755, je fus consulté si le rang devait être accordé pour bois et cordages fournis au navire avant le départ. Je répondis qu’oui; car peu importe qu’on ait prêté de l’argent ou qu’on ait fourni les matériaux. Le cas du fournisseur a même quelque chose de plus favorable, puisque les fournisseurs ne sont pas équivoques; au lieu que l’utile emploi des deniers est toujours susceptible de quelque doute. Cette in-*

terprétation non est etensiva, sed intellectiva. Telle est notre jurisprudence."

Valin, who wrote his commentaries in 1760, mentions (page 400) necessary equipments of the ship made before her departure on any voyage: "Les fournisseurs des bois, des planches et du fer qui y ont été employés; les fournisseurs de voiles et de cordages, et généralement de tout se qui a servi à mettre le naivre en état de faire le voyage."

At page 443, Valin goes as far as to lay down the principle that provisions and equipments ordered by the captain at the domicile of the owners, although prohibited without special authority, should be paid if they were necessary, quoting the maxim of the Ordinance de Wisbuy, generally followed by all maritime nations: art. 65, memo. debet locupletari cum alterius jactura. Such is also the opinion of Boulay-Paty, 2 Dr. Mar. 52. It must be so especially in the present case with regard to the second item of the supply of coal, as it profited the real owners who took possession of it and consumed the same.

Granting that the privileges upon ships are limited to the cases expressly provided for in art. 2383, and I must confess that this contention has a great deal of force, is it indispensable for the appellants to rely upon it? Upon what ground can it be said that they have no privilege upon the very coal they sold and seized in this cause with the ship as one of her accessories? Mr. Macmaster, K.C., for the respondents, admitted, as already observed, that they were entitled to revendicate the same. But if they can revendicate, surely they can be paid by privilege. As I read arts. 1998, 1999 and 2000 of the Civil Code, the unpaid vendor has two privileged rights: 1. A right to revendicate; 2. A right of preference upon the price or the proceeds. Article 1994, par. 3, likewise provides for a privilege upon the article sold.

The appellants have therefore an ordinary privilege for the last delivery upon the coal which, I believe, they can enforce by saisie-arrêt under art. 931 of the Code of Civil Procedure, as being dernier équipour. The debt is personal to the charterers, and I cannot understand why the appellants cannot proceed by attachment upon the coal under art. 931, for they are derniers équipours and the coal seized in this case is the property of the personal debtor. In any event, they had a right to a saisie-conservatoire under art. 955.

For all these reasons, I am satisfied that the judgment of the trial Judge was the only one that could be rendered. I would therefore allow the appeal and maintain the *saisie-arrêt* and *saisie-conservatoire* and the action of the appellants with costs before all the Courts.

DAVIES, J.:—This was an action begun by the appellant company in Montreal against three defendant, the Canadian Lines, Ltd.; William Peterson, Ltd., and Elder, Dempster & Co., the respondents, to recover the price of certain quantities of coal delivered at different times aboard the *S. S. Lake Simcoe* while in Montreal. The action was accompanied by a seizure of the steamship for the amount sued for on the grounds that with respect to \$4,940 of the claim, art. 2383 of the Civil Code created a privilege or lien upon the vessel for the payment of same as a sum due “for furnishing the ship on her last voyage,” and with respect to \$1,082.77, that the appellant was the *dernier équipier* referred to in art. 931 C. C. P., and as such entitled to recover for this latter sum, although the coal supplied was not for the “last voyage” of the ship but for her then ensuing voyage.

The Canadian Lines, Ltd., and Wm. Peterson, Ltd., entered no defence to the action, and judgment went against them by default. Elder, Dempster & Co., the owners of the ship, alone contested the action, and the Superior Court held that although they were not personally liable for the coal, the ship was liable and its seizure legal.

The Court of King's Bench unanimously reversed this judgment, holding that the first quantity of coal delivered to the ship was not for her “last voyage” within the meaning of that phrase in art. 2383, and that for the second quantity delivered, it was avowedly for an ensuing and not a last voyage, and for coal so supplied there was no lien or privilege.

The facts necessary to be ascertained for the solution of the questions in dispute are few, and about them there is no serious dispute, but there is much controversy as to the conclusions to be drawn from these facts.

The *S. S. Lake Simcoe* is a British ship owned by the Elder, Dempster Co., and registered in England.

She was chartered by her owners to the defendants, Wm. Peterson, Ltd., of Newcastle on Tyne, on the 10th day of June, 1904, “for six months from the 16th of June, 1904, for voyages from and between Rotterdam, Havre or Dunkirk

and Canadian ports, Quebec or Montreal," and it was provided that under no circumstances should the steamer sail from or to or touch at any port in the United Kingdom or be employed in trading between any United Kingdom ports and Canada.

Further, it was provided that the hirers should bear all expenses in connection with the navigation and up-keep of the vessel and "provide coal stoves, emigrant outfits, and captain, officers and necessary crew, who should be their servants and bear all expenses in connection with the steamer from the time of delivery" until re-delivery to owners.

Part of the consideration payable by the hirers to the owners was to be "a sum equal to one-half of the profits accruing from the working of the vessel," as provided in the charter-party.

It was argued in the Courts below that this provision constituted the owners partners with the hirers, but the contention was, I think, properly not sustained, and it was not very strongly pressed before us.

The last clause provides that the contract "should be governed solely by the law of England," but this, of course, can have no application to the plaintiffs if their contentions with respect to the meaning and application of the articles of the Code are correct.

After the charter-party was entered into the S. S. Lake Simcoe was delivered to Peterson & Co., and proceeded from Birkenhead to Rotterdam, at which latter place, from which, according to the charter-party her voyages were to start, she loaded and sailed on her first voyage to Montreal, touching at Havre and Quebec. While at Montreal she unloaded and reloaded, and on the 29th July, 1904, took in a quantity of coal as supplies for her voyage from Montreal back to Rotterdam.

This coal was ordered by Thomas Harling, the agent in Montreal of Wm. Peterson, Ltd., and the Canadian Lines, Ltd., which latter company was practically Peterson, Ltd., under another name.

It is quite clear beyond any controversy that there was no personal liability attaching to the defendants Elder, Dempster & Co. with respect to this coal, and both Courts below have so held.

The captain of the ship had nothing to do with the contract of purchase. The sale was made by the plaintiffs to the Canadian Lines, Ltd., acting by their agent in Montreal.

Thomas Harling, to whom the plaintiffs in due course rendered its account for the coal, and a draft was drawn by the appellants at Harling's request for the amount of the account upon William Peterson, Ltd., for acceptance, and was duly accepted by that firm on 10th August following.

On the 20th September William Peterson, Ltd., suspended payment, and on the 23rd September the draft was presented for payment and was refused. Two days afterwards the ship, still being under charter as stated before, was seized in Montreal, where at the time she happened to be loading for what the respondents call her fourth voyage under an attachment for the price of the coal, \$4,940, and also for the price of another lot of coal sold on the 6th September by the plaintiffs to Harling as agent of the Canadian Lines, Ltd., for the said S. S. Lake Simcoe, and about that day delivered aboard of such ship for her use, amounting to \$1,082.77.

The facts with reference to the sale of the latter lot of coal were substantially the same as the former, with the exception that no draft was drawn upon Peterson & Co., Ltd., for the amount, and that it was not contended that the voyage for which it was supplied was the last voyage on the ship within art. 2363 of the Code.

In each case the coal was sold by the plaintiffs to Harling as the agent of the Canadian Lines, Ltd., and Peterson, Ltd., without the intervention or knowledge of the captain, and there is no pretence of personal liability therefor on the part of the defendants Elder, Dempster & Co., nor was their agent in Montreal ever communicated with on the subject of the sale and delivery of either lot of coal.

Immediately after the sale of the first lot of coal in July and its delivery aboard the S.S. Lake Simcoe, the steamer being re-loaded, sailed for Rotterdam, calling at Quebec and Havre, on what the appellants call her second voyage.

At Rotterdam she again re-loaded and sailed back to Montreal on what is called by the appellants her third voyage, and it was while at the latter port on the 6th of September, 1904, and while outfitting and loading for what appellants call her fourth voyage that she took on the second quantity of coal, \$1,082.77, which forms part of the amount sued for and for which the steamer was seized.

Peterson & Co. did not suspend payment until about a fortnight after the delivery aboard of this second lot of coal,

namely, on the 20th September. The seizure was made on the 26th September.

There does not appear to be or to have been any pretence of a revendication of this latter lot of coal, and the only question as it seems to me which can arise upon the record as to this second lot is whether the Code in any of its articles provides in express terms for a privilege or lien upon the ship seized for the price of this lot of coal, and if not whether the seizure can be maintained as to it under the art. 931 of the C. C. P.

I fully concur in the judgment of the Court of King's Bench that no privilege or lien is given expressly. Art. 2383 of the C. C. on which the plaintiffs rely to sustain their seizure for the price of the first lot of coal delivered, \$4,951.29, clearly and admittedly does not cover the second lot delivered in September, which was delivered not for the last voyage, but for a future and ensuing voyage, and art. 931 of the Code of Civil Procedure only provides and is intended to provide a remedy for an existing right and not to create a right itself unless, indeed, in the special contingencies and with respect to the special persons and properties specified in the article. It only applies to a case as expressed in the article "wherein the defendant is personally indebted to the plaintiff in a sum exceeding five dollars," and then only where one or other of the several contingencies specified in the sub-sections of the article have arisen, such as in the case of a *dernier-équipieur* where a debtor absconds with intent to defraud creditors, etc., or secretes, or makes away with property with intent, etc., or being a trader, ceases to make payments and refuses an abandonment of property to creditors, etc.

The article could not, in my opinion, be successfully invoked in such a case as the present, where there neither was any personal liability of the contesting debtor whose property has been seized, nor where any one of the contingencies which justify the invocation of the article by the *dernier-équipieur* can be said to have existed.

The right of the plaintiff to attach the ship for the price of the first lot of coal supplied in July, \$4,951.29, depends entirely upon the true construction of the words "last voyage" in sub-sec. 5 of the article 2383 of the C. C. of Quebec, and to succeed he must shew that the voyage for which such coal was supplied on the 29th July, 1904, from Montreal to Rotterdam, was the "last voyage" of the steamer within the meaning of that phrase in the 5th sub-sec. of the article.

In my view, in order to reach a proper conclusion as to the meaning of the much disputed phrase "last voyage" the article must be read and construed as a whole, and therefore I find it necessary to set it out fully. It reads as follows—

"2383. There is a privilege upon vessels for the payment of the following debts:—

"1. The cost of seizure and sale, according to article 1925;

"2. Pilotage, wharfage, and harbour dues, and penalties for the infraction of lawful regulations;

"3. The expense of keeping the vessel and rigging, and of repairing the latter since the last voyage;

"4. The wages of the master and crew for the last voyage;

"5. The sums due for repairing and furnishing the ship on her last voyage, and for merchandise sold by the captain for the same purpose;

6. Hypothecations upon the ship, according to the rules declared in the third chapter of this title and in the title of Bottomry and Respondentia;;

"7. Premiums of insurance upon the ship for the last voyage;

"8. Damages due to freighters for not delivering the goods shipped by them, and in reimbursement for injury caused to such goods by the fault of the master or crew;

"If the ship sold have not yet made a voyage, the seller, the workmen employed in building and completing her, and the persons by whom the materials have been furnished, are paid by preference to all creditors, except those for debts enumerated in paragraphs 1 and 2."

No contention has been made before us as to whether this article of the Code applies at all to British registered ships or to foreign ships in the Province of Quebec, nor is it necessary, in the view I take of the case, to express any opinion whatever upon the point. If it became necessary it is obvious that arts. 2355 and 2375 would have to be carefully considered together, and in conjunction with the power of the legislature which enacted the Code, and I would not desire to be understood as expressing any opinion whatever upon the points.

The submission of the plaintiffs, as I understand, is that the S.S. *Lake Simcoe* was engaged in making round voyages and that the starting point of such round voyage was Montreal. That the first round voyage was from Montreal to Rotterdam and back, touching both ways at Quebec and Havre, and that

in this view the delivery of the lot of coal in Montreal in July was a delivery on a part of that round voyage, which would be the "last voyage" of the steamer within the meaning of the article in question before the seizure took place, the next and subsequent round voyage when the steamer was seized in Montreal in September, being about to commence from that port at the time of seizure. This view has the inherent defect of entirely ignoring the first voyage of the steamer from Rotterdam to Montreal and the designation of the former part as the starting point of the steamer's voyage, under her charter. The alternative view presented was that even if the round voyage be determined to have begun in Rotterdam in July, it meant a voyage from Rotterdam to Montreal and back to Rotterdam, and that the coal was delivered in Montreal during the course of and to complete that round voyage in July and August, and that this round voyage would, therefore, be the "last voyage" of the steamer before the seizure, within article 2383.

The defendants on the other hand contend that each trip of the steamer was a complete and separate adventure; that neither Rotterdam nor Montreal was the ship's home port, she being a British registered ship; that each trip the vessel made from Europe to Canada and Canada to Europe she discharged her cargo on arrival at her destined port and took a new cargo aboard for another voyage, and that each trip was complete in itself and constituted a voyage; that the coal supplied in July, in dispute, was for the steamer's second voyage, so that the second voyage could not be called in any sense, after she had completed her third voyage, the "last voyage" of the article of the Code.

They contended that the "last voyage" of the article, unless otherwise defined, must mean the last complete transit of the ship from the shipping port to the port of delivery, and if the supplies were not paid for at the port of outfitting and furnishing, the supplier might follow the ship and attach her at her journey's end, and that with the argument as to convenience we have nothing to do. They also contended that the fact of the Canadian Lines, Ltd., having advertised in Montreal to carry passengers from Montreal to Havre and Rotterdam at certain specified fares and "return fare double above rates less 10%," was a mere incident which could not control or over-ride the purpose and object of the hirers of the ship as evidenced by the broad facts to be drawn from

the charter-party and the actual sailings and loadings, ownership and chartering of the ship.

No evidence appears to have been given of the hiring of the crew whether for the single trip or voyage or the round trip or voyage, or for the time, six months, of the hiring of the ship under the charter-party.

I attach little importance to the advertisement offering a holiday round trip from Montreal to Havre and Rotterdam and back, as determining whether each trip was a voyage in itself, or as transferring the starting point from Rotterdam to Montreal; nor do I think there is any evidence in the case to justify us in holding that the round trip theory should prevail.

If one desired evidence of facts from which a conclusion might be drawn that the round trip theory was the correct one, he would have to go outside of the record. Neither Rotterdam nor Montreal was her home port from which the steamer was sailing to a foreign port, and, as I have said, there was no evidence as to the hiring of the crew of the ship, whether it was from Birkenhead, where she was by the terms of the charter-party received by Peterson, Ltd., from respondents, or from Rotterdam or from Montreal, or whether for a specified time or for a specified voyage. All we know is that the ship carried cargoes between each of the latter ports on each trip she made between them, and that there does not seem to have been any necessary relation between these trips as adventures. They were not the same kind of trips or voyages as are made by such of the regular transatlantic lines of steamers as sail from their home ports in either Europe or America across the Atlantic and back, with crews hired for the round trip.

Applying as far as applicable the principles for the determination of the question of fact stated by the Lord Chancellor Lord Loreburn in the late case in the House of Lords of Board of Trade v. Baxter, 1907, A. C. at p. 378. I have concluded that under the evidence in this case each trip of the steamer beginning at Rotterdam, when, and from which port she first started to Montreal, and from Montreal back again, constituted a voyage, and that in this view of the case, the plaintiffs must fail because the trip or voyage for which the coal in dispute was supplied could not with reference to the seizure be in any sense the last voyage of the ship.

But if I am wrong in this conclusion of fact and the voyages of the ship are held to be round voyages, they must, in my opinion, be held to start from Rotterdam and end there, and in my judgment the last voyage contemplated in the art. 2383 is a voyage ending in a port of the province of Quebec. Whether the article must be construed as applying simply to home registered ships or not, I pass by as not being argued and not necessary for decision.

I think each sub-section of the article in question shews that it is intended to refer to a voyage home to Quebec, to the ship's home port, either in the sense of registry there or ownership there, or completing and ending her adventure there. I think when we find the same phrase used and repeated as often in the different sub-sections of the article we must ascribe to the legislature an intention of having the same meaning in each sub-section with reference to it, unless the context shews the contrary to be the case.

Now let us analyze the article a little closely: Its object is to give a preference upon vessels for the payment of certain specified debts; in other words, to create a new maritime lien. It provides that after the costs of seizure there shall be a privilege for the payment of pilotage, wharfage, harbour dues, etc., debts obviously of a local character, but without any limitations beyond that as to voyages or otherwise; (2) expenses of keeping the vessel and rigging and of repairing the latter since the last voyage. To my mind the subject matter dealt with and the language used in this sub-section shews that it was intended to relate to the close of an adventure in some Quebec port after a trip or trips abroad or to other Quebec ports. It covers unstripping the vessel, docking and laying her up for repairs or otherwise, men in charge, machinery or rigging, repairs, etc., etc. I should conclude that the phrase "last voyage" as there used can only have one relation and that is to a voyage, whether round or single, ending in some port in Quebec province. So in sub-sec. 4 with regard to the wages of the master and crew, I draw the same conclusion. The voyage, the adventure, is over and ended, the ship is in the province and the wages of the men who brought her home are made a privileged debt. So, I would agree, it might reasonably be held with regard to premiums of insurance which are limited to those paid for the "last voyage" a reasonable and necessary expenditure to get the vessel to her home port and so privileged. So again with regard to

hypothecations, which it will be seen are to be according to the rules declared in the third chapter of that part of the Code relating to merchant shipping and do not contemplate registered British ships, which by art. 2374 are to be governed in such matters by "the provisions contained in the Imperial law respecting merchant shipping." And so I conclude the last voyage in the sub-sec. 5 means the voyage home to Quebec, and gives the material and necessities man who repairs or supplies the ship with necessities to complete her voyage, to close her adventure, whatever it may have been, by returning to her home port in Quebec, a preference on the ship for such necessary repairs or supplies. The latter part of sub-sec. 5 strengthens this argument. It provides for the cases where the master has to sell part of his freight or merchandise to raise money to enable his ship to complete her last voyage, which I conclude, must mean her voyage to her home port in Quebec, and the merchant or freighter whose goods are so sold for such a necessary purpose has the privilege created for their value because the sale was for the necessary purpose of bringing home the ship. I cannot place a different meaning on the same phrase the "last voyage" used in the several sub-sections. I think the meaning I suggest is the true one. The argument that the article is applicable only to Quebec registered ships has additional strength given to it by the latter part of s.-s. 8, which has exclusive reference to ships built in the province, and which have not yet made a voyage.

The article was not enacted as was argued and assumed by appellants for the benefit of the material or necessities man in the ports of Montreal or Quebec so as to give them a privilege or lien for supplies furnished to ships leaving those ports. I reason so, not only because of its express limitations, but also because its main purport and object seems to have been to provide such security for the material and necessities man in a foreign port as would induce him to furnish the supplies required by the ship to reach her home port in Quebec. To what extent this legislation, if it means what I think it does, may be beyond the legislative powers of the legislature that enacted it I do not stop to enquire. The question was not mooted or argued at bar, and its consideration is not necessary in the view I have taken of the facts.

Some suggestions were made as to hardships such a construction as I suggest would make for the material and

necessaries man in the Quebec ports. But apart from these suggested hardships, which should not in any case be allowed to govern the construction of a statute, and which in my judgment are pure figments of the imagination than business realities (because the material man is not obliged to give credit, and in doing so to ship owners or charterers does so on the same principles as he acts on in his general dealings, that is, gives credit when he thinks it safe to do so and withholds it when he does not), I do not think the construction of the language of the article justifies its application to ordinary trading ships leaving Quebec ports, and the voyages of which could not in most cases be known to the supplier whether as last voyages or ensuing voyages or round voyages or single voyages.

The sole and only question is whether with reference to this British registered ship trading under such a charter-party as we have here from Rotterdam to Montreal, supplies furnished in the latter city to the agent of the charterer or hirer of the ship for the uses and purposes of the ship, but for which the ship-owner was in no way personally responsible, can be held to be within s.-s. 5 of art. 2383 of the Code, and create a preference upon the ship itself so as to enable the material man or supplier to seize and sell it for the cost or value of the supplies on the ground that they were "for the furnishing of the ship for the last voyage."

I would dismiss this appeal and confirm the judgment below on the grounds, first, that each trip of the steamer across the Atlantic in the circumstances of this case constituted a voyage in itself which view, if correct, of course disposes of plaintiff's action: and, secondly, if I am wrong in that, and whether or not the article of the Code in question extends to ships other than those registered in the Province of Quebec, that it does not cover the particular voyage of this ship for which the coal delivered in July and sued for in this action was furnished, a voyage either round or single ending in Rotterdam.

IDINGTON, J.:—This action was brought by appellants in the Superior Court of Quebec against the Canadian Lines, Ltd., William Peterson, Limited, and Sir Alfred Jones & William John Davey, to recover the price of coal sold to them, it is claimed, and delivered at the port of Montreal on the "Lake Simcoe" on two different occasions for use in navigating that vessel.

The first delivery was on the 29th July, 1904, and the price was \$4,940. The second was on or about the 6th and 7th September, 1904, and the price was \$1,082.77. The orders therefor in each case were given by one Harling, the agent, at said port, of the William Peterson, Limited.

The master of the ship had nothing to do with ordering any of the coal, or so far as I can see in any way relative to it, beyond receiving and certifying to the quantity received on each occasion.

The ship was registered at Liverpool and belonged to the firm called "The Elder, Dempster & Company," which was composed of defendants Jones & Davey.

By a time charter these owners let the ship to the defendants William Peterson, Limited, for the period of six months from the 10th of June, 1904, "for voyages from and between Rotterdam, Harve or Dunkirk and Canadian ports."

The second clause of the charter-party is as follows:—

"The hirers shall purchase any coal and consumable stores now on board at current rates, and shall bear all expenses in connection with the navigation and upkeep of the vessel, and shall provide coal, stores, emigrant outfits, and shall provide captain, officers and necessary crew who shall be the servants of the hirers, and shall bear all expenses in connection with the steamer from the time of delivery until the re-delivery of the steamer to the owners as aforesaid."

Clauses 3 and 4 thereof provided that the hirers pay cost of insurance and seven per cent. per annum upon £40,000 from time of delivery to re-delivery or sale, in case they exercised the option given them to buy her.

Clause 5 provides that "the hirers as further consideration for the hire of the steamer shall pay to the owners a sum equal to one-half of the profits which shall accrue from the working of the vessel during each whole or part voyage during the time of hire," and describes the charges to be considered in arriving at such profits.

Clause 7 provided if any voyage should result in a loss the owners should be under no liability in respect thereof.

Clause 11 provided that this contract should be governed solely by the law of England.

The appellants seek, notwithstanding the foregoing condition of things, to render the said sum of \$4,940 a charge upon the vessel which was seized at the commencement of

the action in the port of Montreal. Article 2383 of the Code Civile of Quebec province is invoked to maintain his claim.

Then the second claim of \$1082.77 is rested upon art. 931 of the Code of Procedure.

The appellants also sought to rest their claims on the ground that by reason of the provision I have quoted for sharing profits there was a partnership between the owners and the charterers that rendered the former liable for the debts thus incurred by the latter.

I cannot find under the terms of this charter party, when looked at as a whole, that such partnership existed. I will deal with other aspects of this profit sharing clause hereafter.

There may be cases to which the respective provisions of these articles in these several Codes above referred to will apply.

Wherever one has supplied coal to a ship pursuant to the order of the ship owner, or one authorized to bind him, such provision might properly so bind the owner and ship as to enable the Court of a province where the coal was thus ordered and supplied to seize, and if need be, sell the ship so supplied to satisfy the demand for payment.

But what authority had anyone here concerned to bind the respondents, the ship owners?

The master in charge was not the owner nor in the employment of the owner at all. And as already shewn none of the orders were given by him and he only with the engineer certified to the weights being correct.

Then Mr. Harding, who gave the orders, had no relation whatever to or with the owners. Clearly I should infer everyone knew at that port where the orders were given, that he represented only William Peterson, Limited, or their creation, if I might say so, and ally, The Canadian Lines, Limited, but in no way the Elder, Dempster Company who had in that very port their own offices and agents who never were, but should have been, asked or consulted if it ever had been intended to bind their company.

Then at the suggestion of Mr. Harling a draft was drawn for the amount of the account arising from the first transaction upon William Peterson Co., Limited. I do not say this necessarily waived any right to charge the party properly chargeable with the price of the coal, but I do think it an important fact for consideration in relation to

the question of knowledge that the ship was then under charter party to the William Peterson Co., Limited.

With such knowledge of that fact on the part of appellants, of which evidence meets one at every turn, in considering the cardinal features of the case it would seem quite impossible to suppose that the appellants imagined they were selling on the credit of the owners of the ship or to anyone at all authorized to bind the ship itself by any lien or charge.

The master, even if by representing directly the owner, has no power to create such a lien. True, the owners being rendered liable in such a case, the Court of Admiralty may get possession of the ship, and enforce, by sale of the ship if need be, its judgment for the debt thus created.

This case is not within the range of operation of any such principle of law, or of any other principle of law, that would imply the right in anyone concerned, in acting here, to bind, on these facts, the ship, or the owners thereof. The form of invoice gives the transaction no greater force.

All the rights springing from art. 2383 of the Code in a proper case, have no foundation in fact to rest upon here.

I do not see, therefore, that I am called upon to interpret that article of the Code, so as to determine exactly what the phrase "last voyage" occurring therein may mean.

To reach by said article of the Code such results as claimed here it seems to me necessary to refrain from looking at anything else in the case and hold that a ship owner may by virtue of said article lose his ship by acts not his own directly or indirectly, but of some one acting without his authority. Maritime liens may arise out of wholly unauthorized acts. This claim is not founded on one of such maritime liens. Nor does the article create a lien. Nor did the law on which it was founded contemplate doing so in that sense. Can it be said that the privilege could be enforced in an English Court in Liverpool as a maritime lien could be? Article 1893 of the Code defines what is meant by it in using the word privilege.

The English law would probably have as the law of the flag of the ship governed the limits of authority. See *Lloyd v. Guibert*, L. R. 1 Q. B. 115. But we are not left to guess at the intention of the parties in that regard.

It is by the clause 11 referred to above put beyond dispute, that only by the law of England are we to find the authority for binding this ship.

The fact that the owners had a right to a share of the profits in addition to the sum or percentage fixed for compensation has given me a good deal of concern. In some cases the owner's interest that the ship should sail and earn profits has been found a determining factor in implying an authority in the master to bind the owner.

But on the whole case and including all the terms of agreement, and especially seeing the master was not he who ordered, or was employed by the owner, I do not think that the matter of right to profits without any correlative obligation as to losses can outweigh all else. I have not been able to find an exactly similar case.

Only one thing remains, and that is the extent of the rights, if any, of the *dernier equippeur* under art. 931 of the Code of Procedure, and the features of that claim of the appellants which may distinguish it from all else I have said relative to facts common to both items claimed.

There is no right that can be claimed as of privilege or lien for such account, but there is a right given to stop the vessel and all therein when necessary to secure a debt properly incurred for equipment. It must, however, be a debt due from the defendant to the plaintiff.

That herein, not existing when the proceedings were taken, can any after ratification or adoption made it such a debt? A good deal may be said in favour of the proposition that the respondents, the Elder, Dempster Company, adopted this last order and liability thereon as theirs.

Can the owners come in and say as they did here, give us our vessel and we undertake to return it, if it be adjudged we are liable, and by that means carry away the coal just delivered, and use it and profit by it and then repudiate all liability for it?

I fear these acts cannot, in this action at all events, be held to shew a ratification or adoption, and in either case a relation back that would bind.

I regret to find a most righteous claim for the coal with which the vessel steamed away from port by virtue of the respondents' bail cannot, in this case, at least, be recovered from them.

I am compelled to hold the appeal should be dismissed with costs.

MACLENNAN, J.:—The questions on this appeal relate to a steamship called the "Lake Simcoe" of British register, seized in the month of September, 1904, at the Port of

Montreal, under process for the enforcement of a privilege, claimed by the appellants upon the vessel, for coal supplied by them to the ship while lying in the Port of Montreal.

The respondents, Sir Alfred Lewis Jones and William John Davey, carry on business as ship owners in England and in Montreal, under the name and form of Elder Dempster & Co., and being the owners of the "Lake Simcoe," they on the 10th June, 1904, chartered her as she then lay at the Port of Liverpool, to persons by the name of William Peterson, Limited; for six months from the sixteenth of June, 1904, for voyages from and between Rotterdam, Havre or Dunkirk and Canadian ports, Quebec, and or, Montreal. But the ship was under no circumstances to sail from, or to, or touch at, any port in the United Kingdom, and not directly or indirectly to be used or employed in trading between any United Kingdom ports and Canada.

The ship commenced the voyages between the named European ports and Canada, which were contemplated by the charter-party; and on or about the first day of August, 1904, was lying in the port of Montreal; and the charterers on that day obtained from the appellants a supply of coal for the use of the ship, amounting to the sum of \$4,951.29.

The ship afterwards sailed to Europe, and returned to Montreal; and on or about the 6th September, 1904, obtained a further supply of coal from the appellants of the value of \$1,082.77. The charterers soon afterwards became insolvent, and default having been made in payment of both supplies of coal, and of the obligations given therefor, the ship was arrested by way of privilege for both supplies, and the question in the appeal is whether the arrest of the ship can be maintained against the owners for both or either of the supplies.

The learned trial Judge upheld the claim of the plaintiffs against the ship for both supplies; but his judgment was reversed on appeal to the Court of King's Bench, so far as it maintained the seizure and directed a sale of the ship to satisfy the plaintiffs' claim.

The two claims are rested upon different articles of the Code, and I shall first consider the second supply.

The claim depends upon article 931 of the Code of Procedure, and article 2391 of the Civil Code.

Article 931 enables a creditor in certain specified circumstances to attach the goods of his debtor in any case wherein the defendant is personally indebted to the plaintiff in a

sum exceeding five dollars. But there is nothing in the article which warrants the attachment of property, such as the ship in the present case, which is not the property of the debtor, or the attachment of one man's goods for another man's debt. Jones & Co. were not the plaintiffs' debtors, and they were the owners of the ship. Peterson & Co. alone were the debtors, and they were only the charterers of the ship, and not the owners.

But it was urged that article 2391 C. C. made Peterson & Co. the owners for the purposes of the attachment, because it declares that a charterer such as they were, is held to be the owner, "with the rights and liabilities of an owner as respects third persons." But that is very far from declaring that the charterer may charge the ship with his debts or liabilities. It is the rights and liabilities of the charterer which this article is dealing with and defining, not those of the owner. I think this article means only that the charterer may not escape liability for his engagements with third parties, in the management of the ship under his charter, by saying that he is not the owner.

I also think that article 2397 is a difficulty in the way of the appellants, for the owners of the ship were present at the port of Montreal by agents who represented them, and it is not pretended that they authorized the purchase of the coal in question.

I am therefore clearly of opinion that the judgment is right with respect to the second supply of coal, and should be maintained.

The question of the first supply is one of greater difficulty.

That article declares that there is a privilege upon vessels for payment of the following debts:—

- (1) The costs of seizure and sale, according to article 1905;
- (2) Pilotage, wharfage and harbour dues, and penalties for the infraction of lawful harbour regulations;
- (3) The expenses of keeping the vessel and rigging, and of repairing the latter since the last voyage;
- (4) The wages of the master and crew for the last voyage;
- (5) The sums due for repairing and furnishing the ship on her last voyage, and for merchandise sold by the captain for the same purpose;

(7) Premiums of insurance upon the ship for the last voyage.

There are other two sub-sections (6) and (8), and the question is whether the first supply of coal was furnished to the ship, pour son dernier voyage, as expressed in the French version, or on her last voyage, as expressed in the English version.

The coal was supplied at the request of the charterers while the ship was lying in the port of Montreal, after which she proceeded to sea, sailed to a European port, and then returned to Montreal, when the seizure was effected.

The question to be decided is, was the coal supplied on or for the ship's last voyage. In other words what is the meaning of the words last voyage, as used in s.-s. (5)?

The meaning of the word voyage, when applied to a ship, depends, in any particular case, on the employment in which the ship is engaged. If a ship of war, or other ship, is sent on a particular expedition, her voyage would generally include her return home as a voyage of convoy, or of exploration or discovery, such as the voyage of Columbus, Captain Cook, Jacques Cartier, and other famous explorers.

It is otherwise in the case of the great Atlantic passenger steamships. In their case I think speaking generally, each passage across the sea is a voyage, and I think the same is true of ships like that in question, for their business is similar to that of the great liners, namely, the carrying of passengers and cargoes across the sea, and loading and discharging on both sides.

The ship in question was chartered in Liverpool, where she was then lying, expressly for voyages between certain named European ports and Canada, and she was to be delivered to her owners, when the charter expired, either at Liverpool, or in some continental port at the option of her owners.

The ship's first voyage began in Europe, and her last voyage was to end there, whether the voyages were to be regarded as round voyages, that is including the crossing of the ocean and return, or whether each passage across the ocean was a separate voyage. If they are to be regarded as round voyages, then the appellants ought to succeed, for in that view the coal was supplied in the middle of a voyage, and the seizure was made in the middle of the next voyage, and while it was still incomplete.

The same conclusion follows if the voyages are to be regarded as round voyages, even if we suppose them to have commenced in the port of Montreal.

But if each passage across the ocean is to be regarded as a voyage, within the meaning of the sub-section, then the coal was not supplied on or for the last voyage, for on that construction she would have made a complete voyage between that for which she received the coal and her seizure.

I am of opinion that the fair and obvious meaning of the word voyage, as applied to this ship, having regard to her charter and her employment, and to the ordinary and common use and understanding of the word, is a single passage across the ocean; and that the ship having made two voyages across the sea between the supply of coal and the seizure, the s.-s. (5) of the article is inapplicable, and the seizure cannot be maintained.

I am further of opinion that the same conclusion follows from an attentive consideration of s.-s. (5) itself.

It provides a remedy for supplies and repairs obtained for the ship in two ways, namely, first, on credit, and second, by the sale of cargo by the captain in case of necessity, as authorized by article 2399 of the Civil Code. The voyage referred to in the sub-section must be the same voyage with reference to both kinds of debts, that is the debt for supplies and repairs obtained on credit, and those obtained by sale of cargo. The extreme act of selling merchandise for repairs or furnishings could not lawfully be resorted to by the captain either at the leading port, before sailing, or at the port of discharge after arrival. The sale which he is authorized to make must be one made in the course of his voyage at some way port of call, between the time of loading and the time of unloading and by reason of necessity, to enable him to complete his voyage. When upon the arrival of the ship at the port of discharge, the owner or consignee of the cargo, or any part of it, goes to the ship for his goods, and finds that they have been sold by the captain, he has a privilege upon the ship by virtue of the sub-section. The conclusion is therefore plain that the word voyage used in the sub-section means a voyage between the port where the ship has been loaded, and the port of discharge, that is, in the present case, each separate passage across the sea.

That being so the seizure for the first supply of coal was too late, and was unauthorized, as the coal was not supplied either on or for the last voyage.

I am therefore of opinion that the appeal fails and ought to be dismissed with costs.

DUFF, J.:—The facts in evidence in this case do not, I think, afford any satisfactory reason for holding a passage of the respondent's ship from Rotterdam to Montreal, or a passage from Montreal to Rotterdam, to be other than that which in the ordinary sense of the words it would seem to be—a single complete voyage; and the debt upon which the appellants base their claim of privilege was consequently not incurred upon a voyage which in relation to the proceedings in which the claim is made was in fact the ship's last voyage.

Nor do I see anything in the provision of the Civil Code which we are called upon to apply, justifying the view that a given voyage can for the purposes of the enactment be regarded as the "last voyage" if it be not the "last voyage" in fact. It is not disputed that assuming a given voyage to be a "voyage" within the meaning of the phrase in controversy, it is the "last voyage" within the meaning of the enactment only when it is the voyage last preceding the legal steps taken to enforce one of the rights conferred; and it follows in the view I have indicated—since between the complete voyage from Montreal to Rotterdam and the proceedings to enforce the appellant's claim there intervened a complete voyage from Rotterdam to Montreal—that a debt incurred in respect of supplies furnished for the first of these voyages cannot be made a foundation for a valid claim of privilege; and that the appellants' claim being based upon such a debt must fail.

Appeal dismissed.

NOVA SCOTIA.

THE FULL COURT.

APRIL 4TH, 1908.

STAVERT ET AL. v. LOVITT ET AL.

Banks and Banking—Insolvency—Winding-up — Dividends Paid Impairing Capital—Directors—Negligence—Breach of Trust—Illegal Borrowing—Fraud on Shareholders—Connivance of Directors in Wrongdoing of Bank's Officers—Action against Directors by Curator—Liability.

Appeal from the judgment of TOWNSHEND, J., in favour of defendants in an action brought by the plaintiff William

E. Stavert, curator of the insolvent Bank of Yarmouth, appointed under the provisions of the Bank Amendment Act, 1900, and liquidator appointed under R. S. C. c. 129, the Winding-up Act, for the purpose of winding up said bank and the defendants' president and directors of said bank, claiming an account of dividends paid out by which the capital of the bank was impaired and repayment thereof, and also an account of amounts lost to the bank by reason of misfeasance or breaches of trust of the defendants and repayment thereof, and an account of moneys lost to the bank by reason of the negligence of defendants in their office of directors of said bank, and judgment therefor. The Bank of Yarmouth was subsequently added as a plaintiff.

H. McInnes, K.C., and A. B. Morine, K.C., for plaintiffs.

H. A. Lovett, K.C., and E. H. Armstrong, for defendants.

MEAGHER, J.:—The defendants, who were the directors of the bank at its suspension in March, 1905, are charged with malfeasance and breach of trust in several matters; but those relied on were: (1) The payment of dividends when no profits were earned, and which they knew impaired the capital, and knowingly, wilfully, and contrary to the statute, concurring in the payment of dividends impairing the capital. (2) Purchasing and holding real estate in contravention of the Banking Act. (3) Purchasing as directors, bills drawn by Reddings, an insolvent firm, upon persons having no existence and using the bank's funds to pay therefor, discounting notes of that firm which were worthless and making large advances to such firm without security or upon securities the defendants knew were worthless; permitting that firm to overdraw its account largely, and finally failing to exercise supervision over the business or affairs of the bank, and that in the particulars mentioned the defendants were guilty of gross negligence.

John Lovitt became a director in 1874, and president in 1900. Crowell became a director in 1894, and vice-president in 1900, while Augustus Cann and Leslie Lovett were elected in 1900, and Bradford Cann in July, 1901.

The paid-up capital was \$300,000, and the shareholders were subjected to a double liability upon their shares. The entire loss to the shareholders was \$530,000; \$260,000 thereof was paid on the double liability. Ten dollars per share has been repaid them by the liquidator, and a further small

payment is looked for. All claims have been paid and the expenses of liquidation provided for.

The bank was probably insolvent in 1900 or very soon after; but the defendants had no suspicion and no reason to suspect it was so until about August, 1904.

The suspension was due to losses made on the transactions had with W. H. Reddings and his firm of W. H. Reddings & Sons.

The purchase of the real estate was made in good faith and was not ultra vires. It was prompted by a desire to recover through a resale at a profit, part of the debt from the then owners to the bank and was at most an error of judgment in a matter of business.

The purchase was not a breach of the statute. The only consequence therefore is the possible forfeiture of the land to the Crown upon a proper proceeding for that purpose for holding it beyond the statutory period. No such proceeding has been taken and no injury shewn beyond possible loss of interest. The defendants failed to make a satisfactory sale and the title remained in Crowell for the bank until July, 1905, when, at the instance of the liquidator, he conveyed it to the bank. John Lovitt and Crowell were directors at the time of the purchase. The others were not. I am unable to say the judgment below is wrong on that subject.

The following findings were made:—

First.—There was nothing fraudulent in the conduct of the defendants, collectively or individually, in the management of the bank's affairs, but there was considerable that was unbusiness-like, and while more or less negligence and incapacity were shewn, yet it was not gross negligence, and they were therefore not liable.

Secondly.—The cashier was assisted by a staff of competent officials, in all of whom, including Johns, the cashier, the defendants had full confidence as to their honesty, fidelity and capacity. They relied implicitly on the cashier's reports and statements, and acted upon them accordingly.

Thirdly.—The cashier abused their confidence and concealed from them all the facts touching Redding's account, and their business with the bank and the absence of closer investigation by the defendants, was due to their over-weening confidence in his ability and integrity.

The learned Judge also said he saw nothing to lead him to doubt the truthfulness of the evidence given by the defendants.

Six per cent. dividends were paid for 1896 and 1897, and thereafter five was paid each year, including 1904, which latter was declared at the end of December, 1904, and paid in February, 1905.

The facts connected with the dividends will appear from the description of the general affairs of the bank and the Reddings' account, and need not be treated of separately.

It was not contended, except in the way I shall presently mention, that the finding as to the absence of fraud was erroneous, but it was insisted that there was gross negligence, and if the defendants did not know of long before 1904 the state of the Reddings' account, it was because they wilfully abstained from making any inquiry and shut their eyes to the facts, and the law regarded such conduct as gross negligence and bordering on fraud.

It was also contended there was moral obliquity in respect to events after August 18th, 1904, and the hopes sustained thereafter through the cashier's dealings with Reddings.

The defendants met as a board twice a week, when local paper, submitted for discount, came before them for approval or rejection. What was regarded as local and therefore to come before the board, was negotiable paper of parties in Yarmouth county and the two adjoining counties. The great bulk of it was made by parties residing in Yarmouth town.

The amount which thus came before the board, and was discounted, averaged about \$60,000 in each year for a series of years preceding the suspensions. Reddings' local paper constituted a substantial proportion of that amount. The total loss on this branch was only about \$10,000.

Bills or drafts drawn, no matter by whom, upon parties outside of the counties referred to, as well as notes made outside of that area, those at any rate in favour of the Reddings, did not come before the board at all, but were dealt with exclusively by the cashier alone, upon his own judgment and without reference to any of the defendants whether they were to be handed in for collection merely or to be cashed. The percentage of drafts from Reddings which had bills of lading attached and which passed through the hands of the cashier alone, was merely nominal. The defendants, however, were led to believe the fact was otherwise.

The cashier disregarded, to a large extent, if not wholly, the practice as to what was deemed local paper, and included in the cashing and discounts by himself alone, a large amount

for Reddings, which, being local, should have gone before the board. In addition to the discounts given by him to that firm he permitted it to overdraw their accounts largely. Many of the drafts which he cashed for Reddings were drawn by them upon parties all over Canada, many of whom never existed. Many others never had any dealings with them and upon some who never were in business and others who were dead or who had gone out of the country years before.

Johns, of course, knew, at an early stage, that nearly all their drafts were fictitious. His conduct as early as 1900 and probably before was fraudulent. He would be, therefore, all the more likely to keep all knowledge of his irregular transactions with Reddings concealed from the defendants who confided in him down to a period and to an extent that is surprising even considering their entire good faith.

W. H. Redding, in 1892, removed from Hebron, a suburb of Yarmouth, into that town. His business to that time was small. He then owed the bank several thousand dollars, for which he gave a mortgage, but upon which nothing was ever paid. It is now represented by an account exceeding \$8,000, which was called "special" upon the bank's books.

In February, 1903, he took his sons into partnership at Johns' suggestion under W. H. Reddings & Sons. The sons had no means.

If the cashier regarded the elder Reddings or his sons as of good credit or good business standing at any time in their respective business careers, the other bankers and bank agencies there did not, nor did many of the business men of that town, including some of the defendants.

The defendants knew Johns was making discounts for, or advances to, Reddings upon their drafts, but it appears to be the usual course to entrust that branch of business to the cashier because of the delay and inconvenience liable to arise from consulting the board. They, however, believed, relying upon Johns' assurances, that the discounts or advances so made were upon bona fide drafts on Reddings' customers with bills of lading or invoices attached, and that while the amount was, to their knowledge, large, yet the bank held that firm's customers' paper for it, which Johns calls "rated paper," and was good for the amount. By "rated paper" Johns presumably meant the paper of customers who were rated by the commercial agencies as in good credit and good for what they owed Reddings and beyond that. Such was

evidently the meaning the defendants drew from his reports to them on that subject.

When the president learned the amount was large, he instructed Johns not to let the Reddings have any more money, but made no inquiry or examination into their account, and took no steps to enforce obedience to his directions not to see whether they were observed or not.

Johns' assurances and reports to the defendants in respect to these matters were grossly untrue, and they were deceived by them.

The written statements supplied by Johns monthly for transmission to the Finance Minister, as well as those submitted annually for the general meeting were, as to amounts under the various headings, probably substantially correct, except perhaps as to profits and reserve in the annual statements and as to classification in respect to current loans. The vice, to borrow a phrase, was not so much in the books upon their face, nor in the reports, but in the utter worthlessness of the bills and notes which he received from Reddings and cashed for them. By far the largest part of these had not been accepted and were almost wholly fictitious, and when not so had no business foundation. There was also from early in 1903 a large overdraft and a considerable one even before then. All of these were classed under the heading "Notes discounted, current loans, and other assets, etc."—in the annual statements and the monthly reports as well. It was also untrue that the estimated loss in respect to bad debts had been written off. The representations thus made to the defendants were deceptive in classification and largely untrue.

The evidence of the experts who examined the books (and which was not impugned) shewed that Reddings' liability, which was about \$51,000 in 1895, rose rapidly each year until in 1900 it was about \$240,000; in 1901 it was nearly \$340,000; in 1902, \$449,170; in 1903 over \$475,000, and in 1904, over \$490,000, while in 1905 it was \$495,537. The actual amount at the suspension was in excess of \$480,000, of which all but \$5,000 was then overdue. Of Reddings' gross liability \$50,000 matured in 1902; \$250,000 was covered by drafts not accepted and of which \$44,000 was dated in 1902, \$148,000 in 1903 and over \$57,000 in 1904.

Reddings' drafts began to come back unaccepted in large quantities in 1899; these increased in 1900; still further in 1901 and more so in 1902, and still more in 1903.

The total amount realized from Reddings' estate and those liable upon their paper held by the bank was only \$20,734, leaving a loss of about \$460,000. The amount received from the parties upon their paper was less than \$8,500, about \$70,000 of the paper in the bank was advertised for sale by tender, and the best bid was \$6,500.

Reddings' overdraft at the suspension was \$103,000 apart from the mortgage account. Up to the beginning of 1903 the drafts which Johns alone handled were renewed or replaced by others—at least to a considerable extent, and were so managed as not to appear overdue upon the books to any alarming extent. In January of that year another course was pursued which Stavert says gave the appearance of a material reduction in the bills local and remitted for that firm. It is thus explained by E. P. Stavert, the large amount of paper coming due was allowed as it matured, or was returned not accepted, to remain unpaid on the books, and nothing was done to renew or replace it. In that year the Reddings' overdraft increased over \$80,000. This was because cheques given by them to retire "bills remitted" and dishonoured, were passed by the cashier and charged to overdraft. All knowledge of this was kept from the defendants.

Charges were made by the cashier upon all the Reddings' transactions, either by way of discount, commissions, or collection charges; but principally I believe under the first of these items, and these constituted a large part of the supposed profits of the bank meanwhile. When the change was made in 1903 and the drafts which came back were received or replaced, the changes in respect to the latter ceased and the so called profits diminished accordingly. It is difficult to see how in any sense there were any profits during the last five or six years of the bank's life from that part of Reddings' account which Johns managed. Their transactions were practically wholly fictitious, or worthless, no money worth naming came from them to the bank.

It was the bank's money which was applied, because, when a charge was made it was taken out of the sum advanced, but as practically no money ever came back to the bank, the profits were illusory. There was really no security held for Reddings' liability, which eventually absorbed its entire paid up capital, any reserves, if any such existed, its current deposits, as well as about one half of the interest bearing deposits then on hand.

In 1903 and 1904 their liability respectively was about \$365,000 and \$480,000—all practically valueless. Yet in those years the annual statement only shewed an aggregate of about \$36,000 for past due account "estimated loss written off." If their liability even for 1898 or 1899, appeared as it should have, as a bad debt, which it was in fact, it would have shewn that all the reserve was lost and a substantial part of the paid up capital as well. The amount in 1900 was nearly sufficient to absorb the stated reserve and the paid up capital too; in 1901 it was large enough to do so, and in each succeeding year it went far beyond both. There is no evidence, at least we were not referred to any, to shew how the reserve, or the reported profits in the annual statement, were made up.

Reference was made to the discussions at the board meetings about Reddings' account, its extent, and the anxiety displayed over it. But the evidence as to that can fairly be read as having reference to their local discount, and not to that contracted with Johns. But if not, their reliance upon Johns' assurances already mentioned affords them their only protection for acts prior to August 1, 1904.

Even when they learned at that time the extent of Reddings' liabilities they accepted Johns' assurances that he had raised customers' paper for it, and were lulled into the belief (I think "hope" would probably better express the state of their minds) that the loss on it would not exceed \$180,000. But even that fact shewed the entire unreliability of Johns' previous assurances of the value of what was held for that account and weigh heavily against the defendants in respect of transactions after that, with Reddings'.

John Lovitt's evidence was assailed for want of consistency and candour touching an arrangement between the cashier and Reddings about notes to cover their indebtedness, the partnership formation, and an alleged understanding on the part of the bank, to carry the firm along—said to have been made about February, 1903.

A careful perusal of his entire evidence on the point, taken fairly together, and in the light of the questions, will shew he was aware of the partnership arrangement and admitted the fact—but denied knowledge of the notes—and the arrangement to carry the firm along. At any rate it was, I think, evident that when he answered the questions near the foot of page 195, two of them negatively, and the next one affirmatively, he understood the former to have reference to

an arrangement to carry the firm and its business along. That view makes his evidence consistent, while any other renders it inconsistent, and apparently deliberately untrue in part. Something I cannot readily assume of one whose character for honesty and truthfulness stands very high in the estimation of all who knew him.

The annual statements between 1896, and the end of 1904, shewed a decline in the bank's assets of nearly \$350,000—from \$1,073,000 to \$728,000. Interest bearing deposits which were \$535,000 in 1896, were only \$237,000 in 1904; the decline was continuous. Current loans, etc., in 1896 were \$587,000, and in 1904, about \$40,000 more.

In 1896 there was due from other banks \$275,192; in 1900 it was \$125,000, and thereafter the decline was so sharp that in 1903 it was but \$20,942, and in 1904 nearly \$6,000 less. On the other hand there was no liability to other banks prior to 1903; in that year it was over \$31,000, and in 1904 it was \$43,000. Between 1896, and 1904 its own notes in circulation diminished about \$23,000, and in the same period its specie and Dominion notes decreased over \$50,000, while its investments meanwhile fell steadily from \$91,600 to \$33,650. The earning power of the bank was materially lessened accordingly, and especially because of the large reduction in interest bearing deposits.

In October, 1903, local depositors were withdrawing their interest bearing deposits quite fast. That, however, may have been due to some other cause than lack of confidence in the stability of the bank—or what was known outside of Reddings' account with the bank.

About that time the bank obtained a credit with the Bank of Nova Scotia for \$25,000, which was increased later to \$40,000. The president gave his note for the former, and the directors for the latter.

It was claimed the letters of the Royal Bank of December, 1902, and January, 1903, were before the board, but if not the defendants knew their contents.

If they saw them or were aware of their contents at or about that time and wilfully or carelessly ignored what they disclosed, they were guilty of gross negligence. If the learned trial Judge accepted that contention he must have held them liable for losses through Reddings after that. I regard his finding as opposed to the appellants' claim in this particular.

I am unable to regard the evidence as shewing that they saw the letters, heard them read, or became aware of their contents. It was said Augustus Cann's evidence did not deny they were read before the board. He says he never saw them; if read before the board or produced when he was present, he must have seen them, and I, therefore, accept his statement as a denial of both aspects. The learned trial Judge treated their evidence as truthful, and I feel obliged to regard his findings as necessarily covering both aspects, viz., that they neither saw the letters, nor knew their contents. I am not prepared taking the strongest possible view to overturn his conclusions on this branch.

It is altogether improbable Johns, who had so much to conceal and must have been anxious to avert the disclosures the letters would have made, would bring to the notice of his board a series of facts so damaging to himself and which he must have believed would mean his dismissal in disgrace.

There is, however, force in the fact which was known to the board that the Royal Bank desired an increase of credit from their bank. The defendants did not seem to appreciate its real significance; and it cannot well be said that their failure to do so made them liable for negligence in respect to subsequent events which might perhaps have been prevented if they realized the full import of the demand thus made.

These observations apply as well to the change of agency from the Royal to the British Bank, which followed almost immediately. Johns' conduct and representations in connection with the situation at that juncture, no doubt, had much to do in producing the impression upon the defendants that there was no cause for alarm or inquiry.

During the period beginning with 1896 and ending with the suspension, the annual statement shewed there was about \$600,000, speaking roughly, in the shape of "notes discounted, current loans, etc." Its assets were but little over one million dollars. Consequently, about three-fourths thereof was to their knowledge loaned under that heading, only about-one-tenth of which was contracted under their supervision, and the other nine-tenths through the cashier alone.

Upon this basis it was contended that ordinary care and diligence demanded the defendants should have examined into the securities representing so substantial a portion of the capital and assets; they failed to do so, at any time, and were liable for losses which such diligence would have prevented.

If they were under that obligation it is not easy to acquit them of a degree of negligence bordering closely on that which might be termed gross or culpable in the circumstances. Lord Halsbury appeared to think it was not directors' duty to detect frauds (Dovey and Corey), and from their confidence in Johns' efficiency and reliability they were perhaps not under an obligation to examine or value the securities held.

They cannot, assuming the existence of such a duty, shelter themselves under alleged inexperience, nor incapacity for the duties of directors.

The law, I conceive, requires me to hold that when they accepted the position of directors they thereby *prima facie* impliedly undertook that they respectively had reasonable skill and ordinary diligence fit for the business in which they engaged. See Story on Agency, sec. 140. Beven on Negligence, vol. 2, page 1274; Jessel, M.R., in *Forrest Dean Co.*, 10 C. D., 452, and Fuller, C.J., in *Briggs v. Spaulding*, 141 U. S. 132.

The law, however, seems to call for proof of gross negligence before a liability can be imposed upon directors. It is, therefore, a question of fact and has been found adversely to the argument just alluded to; and in addition there is the great weight to be given to the consideration that they relied and were entitled to rely, upon their confidence in the bank officials, and upon their reports and statements. They had a right to expect, too, that if anything at all seriously wrong was being done by Johns it would come to the notice of the accountant or teller, who would inform them of it.

Whatever my conclusion might have been upon these and similar facts, if I had been the trial Judge, I cannot, as to matters before the 18th of August, see my way clear to overturn the findings made founded as they are upon more or less conflict of fact, upon inferences from facts, some of which were undoubted and some disputed. Moreover, it would be unfair to judge the defendants by the event—and one has to guard against being influenced unduly by it.

A director is not obliged to examine the books, but if he becomes aware of anything which reasonably suggests the need of an inquiry, it is his duty to ascertain from the officials what it means and to seek full information and explanation regarding it; and if in the course thereof he should be misled by them he is not blamable if he abstains from further inquiry—unless there are circumstances connected with the

incident, or the explanation, which cast a doubt upon the latter, or point to the need of prudence proper to be employed.

There may be room for a distinction as to the liability of the directors and the degree of care to be exercised by them in matters of mere routine, such for example as verifying the securities and assets of the bank, counting the cash from time to time and matters of that class, where mere inspection or examination only is necessary, and that demanded of them in the general business affairs of the bank, such as making loans, estimating the value of securities offered, abstaining from suing parties whose liabilities were overdue and other transactions of a kindred character calling for the exercise of judgment and discrimination and in respect to which opinions may differ and mistakes often occur; but the authorities I have seen do not appear to recognize any distinction in principle in this particular. I shall, therefore, abstain from discussing the point.

Augustus Cann after the 18th of August began an investigation into the paper held, but failed to discover that the great bulk of Reddings' drafts had not been accepted, or were long overdue, Johns gave him material from them and he took down the amounts and parties. He trusted Johns to give him correct information, but he deceived him. He tried the same tactics with Thorne at the outset of the latter's investigation, but being an expert the trick failed.

Cann with Johns' aid estimated the loss would not exceed \$180,000, but if they ascertained the facts their knowledge of Reddings' financial standing would at once have told them it would be more than twice that sum, enough to swamp the entire assets and nearly the whole of the double liability, too.

It was agreed that while the decision shewed that directors were entitled to rely upon their officers and could justify accepting their statements unless suspicious circumstances existed to their knowledge adapted to stimulate inquiry on their part—yet this meant no more than that they could justify relying thereon only where it could be shewn they had done all that reasonable care and prudence demanded—but were deceived in matters of detail which they could not be expected to overtake.

It was, therefore, urged that their having to borrow from the Bank of Nova Scotia, apparently to meet withdrawals of interest bearing deposits was quite enough to compel inquiry as to the need for such a step, and why they had not enough money in hand for needs of the bank; that Johns' assurances

and explanations were too trivial and absurd to stop such an inquiry; that the situation was strong enough to create distrust in the mind of any reasonably cautious man as to the position of the bank's credit and affairs; and further, they were more or less alarmed, as was shewn by their endeavour to get information about that time from Johns, touching the Reddings' account—yet in the face of all this they did nothing. The circumstances enumerated shewed that Johns was not entitled to their confidence. They should, therefore, have had a complete inquiry, or dismissed Johns for failing to supply them with the information they required of him, and in addition, they should have kept a close watch over Reddings' account, and the more so as the president and one other directors at least lacked confidence in their financial ability, and the former had but little faith in their integrity.

I can give but one answer to the foregoing—and it is none too satisfactory even to myself, viz., that the situation involved matters for the exercise, more or less of judgment and discretion upon which the law appears to afford a very wide latitude for the protection of directors, especially when in good faith and without anything very pointed to arouse their suspicion, they relied upon the representations of their regular expert; and to which I add the findings in the judgment under review, which I regard as determining that there was not a wilful shutting of their eyes nor absence of ordinary care as to render them liable.

The aspect I found most embarrassing in this connection was that they had statements from year to year shewing continuous depreciation and lessening of the bank's assets and its earning capacity; the shrinkage of interest bearing deposits indicated diminishing confidence on the part of the public: they knew the very large amount which Johns, on his own judgment alone, had loaned, yet they abstained from active interference, and allowed matters to drift until the collapse came. It is true the shrinkage in assets and falling off of deposits at interest, might have been felt by the defendants to be due to adverse or changed business conditions, and not to any error or mismanagement by the cashier.

The annual statements conveyed the information to the shareholders as to the changes in the affairs of the bank to which I have alluded, but it did not create doubt or alarm in their minds. That, however, does not affect this inquiry.

If the results of the latest year's business and the changes shewn by their statements to have taken place, were con-

trasted with that of its nearest predecessors, or any just previous thereto—enough would have been seen to arrest the attention of ordinary sagacious business men, and to call for an examination into the shrinkage exhibited, and through that the condition of the Redding account would probably have been ascertained. I have already indicated the only answers I can offer upon this branch.

There was a sharp controversy over two papers found together soon after the suspension, in the directors' drawer in the board room, namely, exhibits W. H. 8, and W. H. 15. The former is dated August 17 and the letter August 18, 1904; the earlier one was written by one of the Reddings and is thus endorsed by John Lovett, "Reddings & Sons' statement"—the other was written by Perry, the bank teller. There is some conflict, but no finding, whether Perry submitted it to the board on the 18th or read from it, or merely stated results without having any paper with him. Johns says it was before the board. I attach little or no weight to what he says; but the probabilities greatly favour the theory that Perry had it with him, and after stating the results left it with the directors. I say so for these reasons: It was found soon after the suspension in their drawer along with W. H. 8, which was before them the same day they sought the information it conveyed. Perry was directed to obtain it, and when he did he embodied it in that paper and carried it into the board-room where the directors were in session.

They gathered from what Perry read, or said, or exhibited to them, enough to satisfy them the bank was wrecked, and that Johns had grossly deceived them as to Reddings' account and disobeyed their directions.

The fact that Perry for the first time was instructed to get information for the defendants, and that Johns was ignored, shewed that they had lost confidence in Johns. One of them said the information they got "knocked them cold." It was also proved that some of the directors became angry with Johns and entered into an angry discussion with him, and the president had to interpose between them, thus shewing that one of them, at least, had learned enough to cause him to reproach Johns, and what one knew and spoke of at the board, the rest, of course, knew. Nevertheless, they continued Johns in his position without change, and without any check or oversight other than a direction that drafts should be submitted to the board for approval, and that he must not give Reddings any more money. This was wholly in-

defensible conduct on their part in the light of what they then knew. All reasons for further confidence in him were destroyed, and they should either have summarily dismissed him, or if not they should have so surrounded him with checks and guards as to prevent further mismanagement or wrong-doing by him. They did neither, and therefore I am of the opinion they are liable for all losses sustained through what he did thereafter in relation to the Reddings' account. There is no evidence of any other subsequent losses.

I am not at all sure the liability ought not as to losses through Reddings, to be carried beyond August and until some time in June, at least, viz., to the time when the president or the vice-president began initialling the bills remitted, so-called, and which before then Johns alone dealt with. There must have been some distrust of Johns to give occasion for that caution.

Bradford Cann heard the president on several occasions tell Johns not to let Reddings have any more money; this referred to the account outside of the local discounts and suggests knowledge that the account was, in their opinion, as large as it should be. But, having confidence in Johns, nothing more was probably necessary on their part.

The conversation testified to by McDonald with Leslie Lovett was to carry the matter to June, 1903. I think McDonald was probably mistaken as to the year, and what was said had reference to 1904. Moreover, if the learned Judge believed his evidence as given, it would have been difficult for him to find the good faith which he did on the part of the defendants. Some circumstances referred to by McDonald as having happened about the date he mentioned, and the weight of evidence, too, point to the conclusion that those incidents occurred about August, 1904, and therefore that must have been the date referred to. But if this view is not well founded it was evident his testimony was not accepted below. I do not attach much importance to Anderson's testimony, even conceding its accuracy, because it shews what the state of Cann's mind was with respect to the Redding matter, his belief the account was not then large, and at any rate was secured by customers' paper, which represented real transactions. When the defendants became aware, on the 18th of August, that Reddings' liability was upwards of \$470,000, it must have occurred to them that a very large proportion of it was old paper and necessarily bad, or that Johns was negligent in its collection, and that it could not possibly represent

business transactions for which Reddings or the bank received customers' paper. They knew before then what Reddings' probable average yearly output was. None of them thought it exceeded, if it reached, \$120,000 a year, and they had before them a liability exceeding their product for more than four years.

All annual statements shewed upon their face a sum for profit on the year's business then closing, except that for 1904, which exhibited a loss of nearly \$2,000. The defendants, with that knowledge and the fact present to their minds that the bank was wrecked, its capital sunk, and that it could not reasonably hope to continue business, declared a dividend for that year of five per cent. There were no profits out of which it could be drawn, and I cannot believe they did not so understand the situation.

The provision in the Banking Act prohibiting impairment of capital by the payment of a dividend thereon has the effect it seems to me of casting upon directors the duty of doing whatever may be reasonably necessary to prevent a breach thereof; and when a breach is shewn it throws upon them the task of shewing they are not liable. Whatever may be the true view upon that point, I have reached the conclusion and believe it rests upon a solid basis of fact, that whatever may be said as to the dividends before 1904, the defendants have no answer to that paid for that year. It was an ultra vires act, and was done in the teeth of facts which shewed that it was improper. Reliance upon Johns or his statements do not supply an answer.

They have not shewn he made any upon the faith of which they acted, and if he did, they knew then he could not be relied on, and therefore they should have enquired and judged for themselves.

When they paid, as well as when they declared it, they knew the loss by Reddings, to say the least, would swallow the reserve and all profits on hand, assuming that any of either existed, and go far towards wiping out the entire capital, and they must be taken to have knowingly and wilfully declared and paid it out of capital. Care and caution were demanded of them in that emergency, and they failed to bestow any upon the matters then in hand.

They had formed the intention of selling out as a going concern at that time. They, therefore, had no hope of being able to retrieve its fallen fortunes. I am quite persuaded they knowingly declared and paid the dividends in the absence

of profits, but did so in the hope that it would assist the bank's standing and assist in the sale they contemplated.

I feel free to deal with the facts upon this branch because there is no finding to the contrary. The theory of the judgment is that they were all paid upon the faith of the cashier's reports; but that is not true of the last one, and it would not avail them if it were in the light of what they knew of his unreliability.

Even if the bank was insolvent during the period spoken of, it does not necessarily follow it may not have made profits from year to year meantime. The loss of capital may, perhaps, have disabled it from declaring dividends thereafter, until such lost capital was restored; but I need not express an opinion upon it.

Foster v. New Trinidad Co. (1901), 1 Ch. 208, is authority for the position that dividends may be declared out of profits without the restoration of lost capital. *Falconbridge on Banking*, at page 110, however, doubts the applicability of that case to the position of a bank under the Banking Act. It is desirable that his view should prevail, seeing the great importance to the country of sound banking.

It has been suggested they did not pay the last one out of capital, because there was none left; but if that be so, and it affords an answer to the statute, there is enough shewn to make them liable on the ground of misfeasance or breach of trust. Further, it cannot be said there was no capital in their hands, nor can they justify on such a ground.

It was earnestly contended there could not be a recovery merely for the benefit of shareholders of dividends which had already been paid to them. The view I have taken of the facts relieves me from the necessity of fully discussing that question as to dividends other than the last one.

I may, however, add that from some time in 1900, if not before, the paid-up capital was being constantly diminished by bad debts, as was the case in *National Bank of Wales* (1899), 2 Ch., page 671. But the defendants did not know the fact and I do not feel free to say they ought to have known it, a circumstance the Court in that case said was as important as what was known to them.

The statute enacts that dividends paid in contravention of its provisions are recovered as a debt due to the bank by the directors. A breach of the statute, therefore, creates a debt recoverable by the bank as such. There is nothing in

the statute to suggest the theory that because there are no creditors and the money to be recovered would go to those who had received the dividend improperly paid. Therefore, these facts may be pleaded in bar to an action not concerned with the use to be made of it, or into whose pockets it may ultimately go.

The contention urged, if accepted, would, in effect, repeal the statute or at least paralyze its operation in a case like the present. We must, therefore, confine ourselves to the question whether the conditions exist which enable the bank to re over the debt. Buckley, on the Law of Companies, page 461, says: "The liquidator of the company can enforce this liability even if the creditors have been satisfied and the members only are interested in the assets," citing *National Bank of Wales* above mentioned. Palmer in his work on the same subject expresses a like opinion.

The Imperial statute differs from ours in this, in that it prohibits the payment of dividends except out of profits, but makes no provision for their recovery as a debt. The remedy where the company is being wound up, is prescribed by section 165; but where it is not being wound up the remedy is by an action.

The defence contended there was no averment in the statement of claim that the defendants were guilty of negligence in declaring or paying dividends for the period beginning with the first of 1900 and ending with 1903, and that the charges of misfeasance or breach of trust did not apply. The appellants' counsel can scarcely be said to have contested that view, but they claimed the defence raised the issue of negligence that all available evidence had been given by both parties, and the Court was at liberty to deal with the question as if negligence had been sufficiently alleged. In addition, an amendment was asked for, if the Court thought one necessary, to cure the omission, and if refused, we were asked to state the ground of our decision, so as not to shut out a further action on the grounds of negligence, if in the result one became necessary.

The statement of claim is, in my opinion, sufficient to cover the earlier dividends if the facts warranted recovery. Misfeasance or breach of trust is alleged in respect to their payment. If they were paid out of capital and not out of profits, it was a misapplication of money belonging to the bank, and was, therefore, misfeasance or breach of trust and is sufficiently alleged. Negligence might, or might not, be

an ingredient in the wrongful act, according to circumstances; but I do not conceive it would be necessary to allege it. Rigby, L.J., in *London and General Bank*, No. 2, 1895, 2 Ch. 694, said: "Counsel for the appellant argued that such a failure (failures of an auditor to fulfil his statutory duties) would not amount to misfeasance but only to negligence, but I cannot admit the cogency of that argument."

The liability sought to be enforced in respect to the earlier dividends, is one, if at all, arising from a misappropriation of the bank's capital and not from negligence either in act or omission. There are many cases where it was held that directors who had misapplied funds of the company were guilty of a breach of trust and were declared jointly and severally liable accordingly (see amongst others *Joint Stock Discount Co. v. Brown* (1869), 8 Eq. 381 and those referred to in *Palmer's Company Law* 153, also 154, 178 and 179). Buckley on the same subject, page 565, says "it is not necessary in such a case to establish fraud," and neither do I think it is necessary to shew gross negligence, which may be termed a degree of negligence so culpable as to border on fraud itself or any negligence, because it is enough to shew a breach of trust by the directors.

In *London and General Bank*, No. 2, (1895), 2 Ch. 673, directors were ordered to repay a dividend declared under a delusive balance sheet on the ground that it was a breach of trust or misfeasance. Negligence does not appear to have been charged there.

The statements submitted annually by the directors, as I have already said, shewed profits upon their face. I assume some profit was made, but how much were made, or what relation they bore to expenses and outgoings properly chargeable before the result in the way of profits of the years' operations can be correctly ascertained it is difficult, perhaps impossible, to determine from the record. It is out of the question for this Court to say upon the material before us that they must necessarily have been paid out of capital. If that fact was clearly proved I should regard the pleadings quite sufficient to entitle us to hold them liable as for a breach of trust.

The earlier dividends were, no doubt, declared and paid upon the faith of the accuracy of the statements referred to, but that, it seems to me, is no answer where it is clearly proved the sum paid by way of dividend is taken improperly from capital, a thing prohibited by the statute to be done.

Palmer 180; Cullerne v. London, &c., Society (1890), 25 Q. B. D. 490.

I am, therefore, of the opinion that the facts do not warrant a recovery, and nothing further need be said.

Reverting for a moment to the contention that there could not be a recovery at all because the money would go to those who had already received it from the directors, I may observe, and I do so tentatively only, that when the claim is founded on misfeasance or breach of trust, the shareholders have, it appears to me, a right to complain of the wrong done to them through the return of a part of their principal under the guise of profits which reduced to some extent the earning power of the bank, and though perhaps not entitled to recover whole amount improperly paid—except upon the ground of restoring the trust fund. There is room for the contention that they should recover damages for any injury occasioned through the breach of duty committed by those who stood in the relation of trustees towards them in respect to moneys over which such trustees had control: see per Lindley, L.J., in *Re Lands Allotment Co.*, 1894, 1 Ch. 616, as to the position of directors in that respect.

If this view is unsound, shareholders are left without redress for an admitted wrong, which cannot well be said to have been compensated for by the mere receipt and use of the dividend paid. What they received is not what they believed they were receiving, viz., profits, but part of the principle, and that to the prejudice of the remainder. The wrongful act of the directors in paying the dividends may have lulled the shareholders into a sense of false security and led to the continuance of the business until the assets were entirely lost; much, perhaps all, of which would have been prevented by the course that would probably have been taken—if the improperly paid dividends were withheld.

The appeal should, in my opinion, be allowed with costs, including the costs of the action and trial, and judgment entered for the plaintiffs for the amount of the last dividend without interest at 5 per cent. per annum, together with the losses referred to after the 18th of August, 1904, and interest thereon at the rate mentioned. If counsel cannot agree upon the amount of such losses there will, if further evidence is necessary, be a reference to ascertain the amount, otherwise it will be adjusted when the rule for judgment is moved.

LONGLEY, J., concurred.

LAWRENCE, J., held that the dividend referred to had not been paid out of capital because the capital had been exhausted before it was paid.

RUSSELL, J., concurred with MEAGHER, J., in respect to the dividend, but held that the directors should be held liable for damages from an earlier date, viz., the date in 1903 when the Royal Bank declined their business, on the ground that the directors were then put upon enquiry, and if they had done their duty by dismissing the cashier further losses would have been obviated.

DOMINION OF CANADA.

EXCHEQUER COURT.

APRIL 9TH, 1908.

SIMON VIGER v. HIS MAJESTY THE KING.

*Railways—Government Railway Act, R. S. 1906. secs. 22, 23
—Fences—Person Injured on Adjoining Land—Negligence—Liability of Crown.*

CASSELS, J.:—The points of law raised by the defence were argued before me yesterday. I reserved judgment to consider the forcible argument of Mr. Lemieux, but I am of opinion the points of law raised by respondent must be given effect to.

Section 22 of the Government Railways Act (ch. 36, R. S. 1906), provides as follows:—

“22. Within six months after any lands have been taken for the use of the railway, the Minister, if thereunto required by the proprietors of the adjoining lands, shall erect and thereafter maintain, on each side of the railway, fences at least four feet high and of a strength of an ordinary division fence, with swing gates or sliding gates, commonly called hurdle gates, with proper fastenings, as farm crossings of the railway, for the use of the proprietors of the lands adjoining the railway.

"2. The Minister shall also, within the time aforesaid, construct and thereafter maintain cattle-guards at all public road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway.

"3. In the case of a hurdle gate fifteen inches longer than the opening, two upright posts supporting the gate at each end shall be deemed to be proper fastenings within the meaning of this section.

"4. Every railway gate at a farm crossing shall be of sufficient width for the purposes for which it is intended. R. S. c. 38, s. 16; 50-51 V. c. 18, s. 2."

Section 23 reads as follows:—

"23. Until such fences and cattle-guards are duly made, and at any time thereafter during which such fences and cattle-guards are not duly maintained, His Majesty shall, subject to the provisions of this Act relating to injuries to cattle, be liable for all damages done by the trains or engines on the railway, to cattle, horses or other animals on the railway, which have gained access thereto for want of such fences and cattle-guards. R. S. c. 38, s. 17."

The suppliant can hardly be classed as an "animal" within the meaning of this section. It provides for the damage in case of non-compliance with the provisions of s. 22.

There is no statement that even for the benefit of the proprietor of the adjoining land the duty of erecting a fence, as provided by s. 22, was placed upon the Minister.

As against the respondent no such statutory duty is created, and I think the petition should be dismissed with costs, to be paid by the suppliant to the respondent.

NEW BRUNSWICK.

CIRCUIT COURT.

MARCH 28TH, 1908.

DONALD v. FULTON.

Trover—Conversion—Hay Cut from Farm—Deed—Consideration—Failure of—Maintenance of Grantor—Evidence.

Action for the conversion of seven tons of hay tried before Mr. Justice Landry without a jury at the Saint John Circuit on March 24th instant.

G. H. V. Belyea and A. O. Earle, K.C., for plaintiff.

C. F. Inches, for defendant.

Judgment for plaintiff was given by

LANDRY, J.:—This action is instituted in trover to recover the price of seven tons of hay belonging to the plaintiff and alleged to have been converted by the defendant.

Charles Donald obtained a deed of a farm from one David C. Moore in December, 1904, undertaking as a part of the consideration to maintain said Moore and one Mrs. McFadden. Said Moore and Mrs. McFadden were then living on the farm and continued to live there till August, 1907, when Moore died. For the purposes of this case the plaintiff had the legal title to this farm, and, I infer, though not directly proven, that the plaintiff took control of the farm after receiving the deed to the extent of overseeing the operations thereon, allowing and directing the products of the farm to go towards the maintenance of the said David C. Moore and Mrs. McFadden. The defendant proved that he had to pay towards the support of the two above named, over and above what the farm produced.

It is clearly established that after the death of David C. Moore the plaintiff went to the farm, removed therefrom considerable personal property which he had on the farm, saw that the hay that had been made on the farm was stored in his barn, and secured the barn against anyone entering, by nailing down the entrances. It is also clearly established that at the request of one Moses Moore the barn was opened and a large quantity of hay carried away therefrom, seven tons of which were placed in the defendant's barn. I infer that Moses Moore procured the carrying away of the hay on a pretence of a claim of right; that the neighbours who assisted him to so carry the hay away, by their teams and by the help of young boys, knew that Moses Moore was by these acts attempting to establish a claim or right to the hay, but were also aware that the plaintiff had become possessed of the farm and hay, if they did not know that he had a title. Moses Moore obtained from the defendant permission to store these seven tons of hay in his, the defendant's, barn. I find that when the defendant gave such permission he was aware that the plaintiff had assumed control of the farm and that he had possession of the hay in his own barn, and that the acts of Moses Moore in regard to storing this hay were for the purpose of taking dominion and control of the hay as against the plaintiff, and for the purpose of converting such hay to

his (Moses Moore's) own use, and that the consent the defendant so gave was given with the object of assisting Moses Moore to convert to Moore's own use the hay so stored. I therefore find that the hay belonged to the plaintiff, that there was a clear conversion of it by Moore, assisted by the defendant with the knowledge and with intent to deprive the plaintiff of the use of the hay.

It is true that afterwards, when the plaintiff authorized a Mr. Belyea to go and demand the hay from the defendant, he did not oppose the taking of the hay by the plaintiff; that he then professed not to know to whom it belonged as between Moore and the plaintiff, but said he would not prevent the plaintiff from taking the hay if he so wished. That very act assists in convincing me that he was aware, from the beginning, that the hay belonged to the plaintiff, but was willing to and did assist Moore to deprive the plaintiff of the use of the hay, feeling perhaps that legally he was not making himself personally liable if he took no other part in the transaction than that of consenting to the hay being stored in his barn. But after he was served with a writ he then locked, or caused to be locked, his barn, assumed control of the hay and determined to let the tribunals decide as to whom the hay belonged before giving it up. These transactions, however, outside of assisting to arrive at a conclusion as to his knowledge, intentions and acts previously, do not, in my opinion, alter his liability. After he, with knowledge, consented to have the hay stored in his barn, joining with Moore in the intent to convert it to Moore's use, and to deprive the plaintiff of the use and control of it, and after the hay was placed in his barn under these conditions, he became liable to the plaintiff in trover; and all subsequent acts have not relieved him from that liability.

I therefore find for the plaintiff. There is some doubt as to the value of the hay, but I find it was worth then \$10 per ton, and I assess the damages at \$70.

DOMINION OF CANADA.

SUPREME COURT.

ON APPEAL FROM REGISTRAR IN CHAMBERS.

LA VILLE DE ST. JEAN AND AUGLARE L. MOLLEUR
ET VIR.

Coram,—SIR CHARLES FITZPATRICK, C.J., and DAVIES,
IDINGTON, MACLENNAN and DUFF, JJ.

Appeal—Demurrer—Final Judgment—Jurisdiction.

Appeal from the judgment of the Registrar of the Supreme Court of Canada, sitting as a Judge in Chambers, whereby it was held that the Supreme Court of Canada had no jurisdiction to hear the appeal.

The decision appealed from was upon an application made to the Registrar, in Chambers, under Rule I. of the Rules of Practice of the Supreme Court of Canada, for an order affirming the jurisdiction of the Court to entertain the appeal and approving of the security for an appeal from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court for the district of Iberville, by which the demurrer of the defendants to three counts in the plaintiff's declaration was allowed with costs.

Geoffrion, K.C., and Bisaillon, K.C., appeared in support of the application.

Belcourt, K.C., and Roy, K.C., shewed cause.

The circumstances of the case are stated in the reasons for the Registrar's judgment, which were as follows:—

THE REGISTRAR:—This is an application under Rule 1 of the Supreme Court Rules, for an order affirming the jurisdiction of the Court.

The facts of the case, as disclosed by the material filed, are as follows:—

Pursuant to the provisions of chapter 65 of the Consolidated Statutes of Quebec, being "An Act respecting Incorporated Joint Stock Companies" for supplying cities, towns and villages with gas and water, a company received a charter of incorporation to supply water to the city of St. Johns. Subsequently, by the Act, 40 Vict., of the

Statutes of Quebec, chapter 68, being "An Act concerning the Waterworks of St. John," the said waterworks company became vested in Louis Molleur, the younger, of the town of St. Johns, and he was substituted for the company as proprietor of all its property and charged with all its obligations and responsibilities. By the said last mentioned Act, and by the second section thereof, the said Molleur was granted the exclusive right and privilege to place pipes and water conduits under the streets and public squares of the town.

By the third section it is provided that, if the said Molleur should refuse or neglect to fulfil all the obligations imposed upon him by the Act, after having been placed en demeure so to do by the said town, he and his representatives might be deprived of the exclusive privilege above mentioned.

Section 4 provided that the water should be pure and healthy and should be sold and distributed to such of the inhabitants of the town as should be willing to receive it at the price and on the conditions which the said Molleur should establish.

By section 5 the corporation obtained the right, without charge, to use the water from the water-works for the extinction of fires and to construct and place such pipes, reservoirs, etc., as should be necessary for utilizing the said water for fire purposes, and Molleur was bound, on the demand of the corporation, to keep a constant pressure of 50 pounds of steam per square inch in the boiler of the water-works, so that the same might be made use of in case of fire, upon the corporation paying him a sum to be fixed by arbitrators in the absence of an agreement.

The statute also provided, by section 6, that, any time after the year 1899, the corporation should have the right to purchase the water-works by paying the value thereof, which, in default of agreement, should be settled by arbitration.

By section 9 the corporation might pass a by-law compelling all the ratepayers of St. Johns to supply themselves with water from the water-works, and by section 10 provision was made for fixing a tariff of fees to be paid by the ratepayers in the event of the corporation and Molleur being unable to agree to the same.

Section 12 authorized the corporation to require Molleur to lay down pipes in any street in the town in which there

were none, provided that the owner of the water-works might be able to levy an annual amount equal to ten per cent. on the value of the work and material supplied.

The present action is brought under the third section of the statute to have it declared that Molleur has forfeited all his rights and privileges for the following reasons set up in the plaintiff's declaration:

- (a) The impurity of the water supplied;
- (b) The lack and insufficiency of water pressure for fire purposes;
- (c) The lack and insufficiency of pressure for the supply of water at the domiciles of the subscribers;
- (d) The unjustifiable increase in the rates charged to the consumers of the water in the town who were bound to take their supply from the said water-works;
- (e) The bad state of the waterworks and its accessories and its present incapacity to fulfil the obligations to which the proprietors were bound towards the town and its rate-payers.

The defendant demurred to the declaration generally, and also specifically as to each count thereof.

The Superior Court allowed the demurrer as to the grounds above mentioned (b), (c), and (d), but dismissed it as against the other counts in the declaration.

An appeal taken from this judgment to the Court of King's Bench was dismissed.

Under the practice in the Province of Quebec, an appeal from an interlocutory judgment lies to the Court of King's Bench (appeal side) only by leave of a Judge of that Court, while an appeal lies to the same Court where the judgment of the Superior Court is a final judgment, in all cases except.

" 1. In matters of certiorari;

" 2. In matters concerning municipal corporations or officers, as provided in article 1006 C.P.Q.;

" 3. In matters in which the sum claimed or value of the thing demanded is less than two hundred dollars, and in which judgment has been rendered by the Court of Review;

" 4. At the instance of any party who has inscribed in review any cause other than those mentioned in the preceding paragraph and has proceeded to judgment on such inscription, when such judgment confirms that rendered in first instance."

I understand it to be admitted by the plaintiffs in the present case that according to the practice in the province of Quebec, the judgment herein was interlocutory and for that reason they petitioned a Judge of the Court of Appeal for leave to appeal from the judgment of the Superior Court, and it was by virtue of that leave that the judgment of the Court of King's Bench against which it is now desired to appeal to the Supreme Court, was given.

The plaintiffs contend that a judgment may be interlocutory according to the procedure in the Province of Quebec, but be a *final judgment* as these words are construed by the Supreme Court. I do not find any case supporting such a contention. But the contrary is to be inferred from the judgment of the Supreme Court in a recent case of *Desaulniers v. Payette*, 33 Can. S. C. R. 340, in which the Chief Justice, Sir Elzéar Taschereau, speaking for the Court, said:

“Avec la permission spéciale requise pour en appeler d'un jugement interlocutoire, ce jugement fut porté en appel à la cour du banc du roi par les opposants, mais leur appel fut débouté.

“Ils veulent maintenant en appeler de ce jugement de la cour d'appel. Mais nous ne pouvons recevoir leur appel.

“Il n'y a appel à cette cour que d'un jugement final. Or le jugement en question n'est évidemment qu'un jugement interlocutoire, un jugement d'instruction. Les appelants eux-mêmes n'ont pas cru qu'ils pouvaient en appeler de plein droit à la cour d'appel comme d'un jugement final. Et ils avaient raison. Or, il n'est pas plus final maintenant qu'il l'était alors.”

The plaintiff relies mainly in supporting its contention that there is jurisdiction to hear this appeal, upon the decision of this Court in *Shields v. Peak*, 8 Can. S. C. R. 579; and were it not for more recent decisions of the Supreme Court, I would have been of the opinion that that case could not be distinguished from the present. There the respondent sued for \$4,000 on the common counts, and also by special count alleged that the purchase of goods had been made by the defendants when they had probable cause for believing themselves to be insolvent, and with intent to defraud the plaintiff. The defendants amongst other pleas pleaded that the contract out of which the alleged cause of action arose was made in England and not in Canada. To this plea the plaintiff demurred. Judgment was given in favour of the plain-

tiff on the demurrer to the plea in question, and this judgment was affirmed by the Court of Appeal for Ontario. The defendants thereupon appealed to the Supreme Court of Canada, and when the case was called, an objection was taken to the jurisdiction on the ground that this was not an appeal from a final judgment. The judgment of the majority of the Court on the question of jurisdiction was given by Sir Henry Strong, in which he said that the case was not distinguishable from *Chevallier v. Cuvillier*, 4 Can. S. C. R. 605, and that an appeal would lie.

The latter case, whether distinguishable in principle or not from *Shields v. Peak*, 8 Can. S. C. R. 579, certainly differed from that case in that the demurrer was to the entire cause of action and the judgment finally disposed of the rights of the parties. Indeed, I find on looking at the record in the Supreme Court that the judgment of the Superior Court is in the following terms:—

“Maintient la dite défense en droit et déboute le dit demandeur de sa présente demande contre la dite défenderesse,” except as to certain immovables with respect to which the defendants by their pleas expressly admitted the plaintiff's rights. And in the judgment of Chief Justice Sir A. A. Dorion, he says, in referring to the judgment of the Court below:—

“The Court below maintained the demurrer and dismissed the appellant's action *quoad* the respondent's, except as to the two, lots of land purchased from J. D. Bernard.”

In *Shields v. Peak*, 8 Can. S. C. R. 579, Taschereau and Gwynne, JJ., dissented, and Mr. Justice Gwynne points out in his judgment that “In *Chevallier v. Cuvillier*, 4 Can. S. C. R. 605, the demurrer was to a particular specified portion of the claim in the action and the allowance of a demurrer in such case was undoubtedly a final judgment as to the claim demurred to. * * * But the case here is quite different. It is a judgment allowing a demurrer to one of several pleas upon all of which issues in fact are joined, and yet to be tried. Such a judgment decides nothing as to the action or suit in which the plea is pleaded; the action remains still wholly undetermined.”

The view of the majority of the Supreme Court as determined by *Shields v. Peak*, 8 Can. S. C. R. 579, is not in harmony with either the earlier or later jurisprudence of the court. The first case reported is that of *Bank of British North America v. Walker*, Cass. Dig. (2 ed.) 214. There

the declaration contained eight counts, and six of these were demurred to. The seventh and eighth counts of the declaration were so framed that a verdict thereon in favour of the plaintiff if supported by the evidence would stand, whatever might be the decision of the Court upon the demurrers. An appeal was then taken to the Supreme Court from the judgment on the demurrers, but no appeal was taken from the judgment of the trial Judge which ordered a judgment in favour of the plaintiffs on the verdict of the jury, the reason for this probably being that no appeal had been taken from the trial Judge on this branch of the case to the full Court of British Columbia. After argument the Supreme Court held that the judgment on the demurrers was not one from which an appeal would lie and ordered it to be quashed, but further ordered that the defendants might appeal per saltum from the judgment of the trial Judge and from the judgment on the demurrers.

The next case is that of *Reid v. Ramsay*, Cass. Dig. (2 ed.) 420. This was an action for assault and false imprisonment. The defendants by their second plea justified the assault by virtue of a writ of *capias ad satisf.* issued against the plaintiff under a judgment recovered against him. To this plea the plaintiff made four replications. The defendant demurred to the second and fourth, and in addition the defendant pleaded to the fourth replication a further rejoinder to which the plaintiff demurred. Judgment was rendered for the plaintiff on all the demurrers. The defendant appealed to the Supreme Court of Canada and the appeal was quashed on the ground that judgment appealed against was not final.

In *Rattray v. Larue*, 15 Can. S. C. R. 102, the appellant demurred to an intervention and the judgment of the Supreme Court maintaining the demurrer, disposed finally of the rights of the parties in the intervention. The Supreme Court heard an appeal in this case from the Court of King's Bench, and restored the judgment of the Superior Court. But the case is clearly distinguished from *Shields v. Peak*, in that it was a demurrer to the entire cause of action and the judgment upon it finally disposed of the action.

In *Shaw v. The Canadian Pacific Railway Co.*, 16 Can. S. C. R. 703, in an action for a breach of contract by a railway company to carry the plaintiff's goods in safety, the de-

fendant set up a special contract limiting its liability to \$100, to which the plaintiff made two replications, one of which was that the special contract could not avail against the provisions of section 25 of the "Railway Act of 1879." The defendant demurred to this replication on the ground that it was a departure from the declaration which was in contract, while the replication was in tort. The demurrer was allowed in the Courts below and an appeal to the Supreme Court was quashed on the ground that the judgment was not final.

The judgment in this case would appear to be entirely in line with the dissenting judgments in *Shields v. Peak*, 8 Can. S. C. R. 579.

Finally, in *Griffith v. Harwood*, 30 Can. S. C. R. 315, we have a case which appears to me to be entirely indistinguishable from the present. Here a plea of prescription was set up as one of the defences to the plaintiff's action. The appellants urged, just as the plaintiffs do in the present case, that in so far as the issue raised upon the plea of prescription was concerned, the judgment appealed from was final and prohibited the defendant from availing himself of that defence, which went to the root of the action. The Court, however, following the earlier decisions, quashed the appeal.

I am of the opinion, therefore, after reviewing all the decisions of the Court, that by the more recent decisions it is now well settled that where a demurrer is not to the entire cause of action, but only as to some pleading, and where, notwithstanding the judgment on the demurrer, the action still subsists and there remain issues which require to be tried and disposed of by the Court of first instance, no appeal lies from a judgment thereon to the Supreme Court of Canada.

It is contended in the present case that the result of quashing the present appeal may preclude the plaintiff from questioning the judgment of the Court of Appeal upon the present demurrers, either in the Court below or in this Court, if the case subsequently came on to be heard in an appeal on the merits, and *Shaw v. St. Louis*, 8 Can. S. C. R. 385, is cited as an authority for that proposition. Even if this were the case, the answer might be made which was made to the same argument in *Ontario & Quebec Ry. Co. v. Mar-*

cheterre, 17 Can. S. C. R. 141, where Sir Elzéar Taschereau, speaking for the Court, said:

"The appellant argued, referring to *Shaw v. St. Louis*, 8 Can. S. C. R. 385, that he might eventually find himself precluded from appealing to this Court. Whether that is so or not, a point which of course we have not to determine here, that will be simply because the statute does not provide for an appeal in such a case."

Later on, however, in *Desaulniers v. Payette*, 35 Can. S. C. R. 1, there is no doubt the Court, speaking through the Chief Justice, expressly holds that where an interlocutory judgment had been carried to the Court of the King's Bench and disposed of there in a certain way, that judgment could not be reviewed if the case subsequently, on the merits, reached the Court of King's Bench and an appeal was taken from the second judgment of that Court to the Supreme Court of Canada, the Chief Justice making use of the following argument in support of that proposition:

"And likewise, when the case came up again before the Court of Appeal, that Court could not but hold, as it did by the judgment now appealed from, that the Superior Court had committed no error when it had simply acted in accordance with the judgment rendered upon the first appeal.

"Now, if the Court of Appeal (in its second judgment) has rendered the judgment that it had in law to give, the appellants' attempt to shew error in that judgment necessarily fails, and if there is no error in it they cannot expect us to reverse it. They seem to be under the impression that, because the first judgment ordering them to give security was not appealable to this Court, *Desaulniers v. Payette*, 33 Can. S. C. R. 340, they can now ask us upon this appeal from the last judgment, to review that first judgment. But that cannot be. As we have often said, an interlocutory judgment that cannot be appealed from is *res judicata*. But it is not merely because a judgment is *res judicata* that it is appealable, as the appellants would contend."

It would appear to me, however, that the recent judgment of the Court in *Willson v. Shawinigan Carbide Co.*, 37 Can. S. C. R. 535, must be taken to overrule the decision in *Desaulniers v. Payette*, for there Girouard, J., says, referring to an analogous case where an appellant filed a declinatory exception to the jurisdiction of the Supreme Court:

"The judgment appealed from does not dispose of the whole case, but merely an incident raised by a declinatory exception which was maintained by the trial Court and rejected by the Court of Appeal. Of course in both the trial Court and the Court of Appeal the question cannot be raised again. It is there *chose jugée*, but it can be raised here, if after being disposed of on the merits, the case comes up again before this Court.

"The reason for this ruling is that an appeal on the merits opens all the interlocutories, especially if a reservation or an exception be filed immediately after the rendering of the interlocutories."

The application to affirm the jurisdiction must therefore be refused with costs.

The present motion was coupled with another to allow the plaintiff to deposit \$500 in Court as security for its appeal. I understand that my judgment on this application will be appealed to the full Court. I will, therefore, reserve judgment on the application to allow the security until after that appeal has been disposed of, which will preserve the plaintiff's rights to appeal, although more than 60 days will by that time have elapsed from the judgment below. It has been held (*Attorney-General of Quebec v. Scott*, 34 Can. S. C. R. 282, that the appellant cannot be prejudiced by the delay of the Court in dealing with an application to allow the security.

On the appeal, counsel appeared for the parties, as follows:

Bisaillon, K.C., and Aimé Geoffrion, K.C., for the appellant.

Roy, K.C., for the respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—The plaintiff applied under Rule 1 of the Supreme Court Rules to the Registrar for an order affirming the jurisdiction of this Court to hear an appeal from the judgment of the Court of King's Bench, which confirmed the judgment of the Superior Court.

The Registrar refused to make the order on the ground that the judgment in question is not a final judgment within the meaning of the Supreme Court Act and I was at the argument inclined to agree with him on the authority of

Griffith v. Harwood, 30 Can. S. C. R. 315, and other cases in this Court. Further consideration, however, has brought me to a different conclusion.

By the material before us it appears that the defendant acquired by an Act of the Legislature of Quebec (40 Vict. c. 68), the exclusive right to place, subject to various obligations, pipes and water conduits under the streets and public squares of the Town of St. Johns.

The third section of the Act provides that if the defendant concessionnaire refuses or neglects to fulfil any of the obligations imposed upon him he is liable to forfeit the privilege granted, and the action is brought by the Town of St. Johns claiming a declaration of forfeiture under that section. The five several breaches of the statutory obligations relied upon are set out in separate paragraphs or counts of the declaration. To this declaration the defendants filed a general demurrer and in addition demurred specifically to each count. The Superior Court allowed the demurrer in respect of three of the counts, holding that none of these three counts disclosed facts constituting a legal ground of forfeiture within the provisions of the Act. On appeal, the judgment of the Superior Court was affirmed and on the argument here it was not disputed that the decision of the Court of Appeal constitutes a final determination, so far as the Courts of Quebec are concerned, of the matter in dispute upon the demurrer, that is to say, the question whether the facts stated in any of the counts in respect to which the demurrer is allowed constituted a ground of forfeiture of the privilege, has been finally decided in the negative; the judgment appealed from is final as to those issues, costs are awarded and nothing further remains to be done. See *Shaw v. St. Louis*, 8 S. C. R. pp. 402, 403. None of the questions so decided in appeal can be reheard or re-examined in that Court. See *Illinois v. Illinois Central Rd. Co.*, 184 U. S. R. 77, at p. 92, and *United States v. Camon*, 184 U. S. R. 174, at p. 574.

The question now is whether such a decision was "a final judgment" within the meaning of the Supreme Court Act. Ch. 139, R. S. C. (1906); s. 2, s.-s. (e), defines a final judgment to mean

any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

If the declaration contained only the counts to which the demurrer was maintained, nobody would dispute that such a judgment allowing a demurrer to the whole action would be a final judgment within the meaning of that section, and inasmuch as the grounds or causes of action set out in each of these counts, if good in law, are distinct grounds or causes upon any one of which the conclusions of the action claiming a declaration of forfeiture might be granted, it seems to me that a judgment finally depriving the plaintiff municipality of the right to maintain its action upon any of those grounds or causes is with respect to them a final judgment, that is to say, a judgment by which the rights of the parties on the issues raised by those counts are finally determined and concluded, except in so far as we have jurisdiction to entertain the appeal. It has been argued that there can be only one final judgment in each action, that is to say, the judgment that finally disposes of the whole action; but I do not think that such a limited construction should be put upon the words "final judgment;" although it might be said that if adopted the result would be to give to these words their literal meaning. The French text-writers interpret or define the term "*jugement définitif*," which corresponds with "final judgment," by comparison with and in opposition to "*jugement provisoire, jugement préliminaire et jugement interlocutoire*," all of which they include under the general classification of "*jugements avant faire droit*." Colmet-Daage, in his valuable notes on Boitard, *Procédure Civile* (15th ed.), vol. 1, page 255, says that Boitard is in error when he defines the final judgment as the one which puts an end to the suit and removes it completely from the Court in which the judgment is rendered. Boitard says:

Le jugement définitif dessaisit le tribunal et termine la contestation devant lui.

In his notes Colmet-Daage says:

La définition que donne Boitard du jugement définitif est inexacte; il y a bien des jugements de cette nature qui ne terminent pas la contestation; tels sont ceux qui statuent sur des conclusions d'exception, sur une demande en récusation, sur une demande en renvoi, ceux qui rejettent une demande en péremption d'instance, etc., etc. On ne peut définir les jugements définitifs que d'une manière indirecte, en disant: Les jugements définitifs sont tous ceux qui ne rentrent pas dans l'une des trois sortes des jugements d'avant faire droit.

Dalloz, Laurent and Pigeau all concur in the opinion that there may be several final judgments in the same case,

in the sense that there may be several judgments in the same case which finally decide and dispose of particular grounds of action or issues, without finally disposing of the whole action.

Dalloz, vo. "Jugement," c. 3, s. 1, paragraph 12, says:

De la nature des jugements d'avant faire droit ressortent, par opposition, les caractères des jugements définitifs. Et il résulte clairement de la distinction qui existe entre eux qu'il ne faut pas prendre le mot *jugement définitif* dans son acception rigoureusement littérale, en ne l'appliquant qu'aux décisions qui terminent la contestation d'une manière définitive; ce serait là une erreur. Les jugements définitifs, en effet, sont tous ceux qui ne se bornent pas à *préjuger*, mais qui *jugent* un point—une question quelconque du procès, non pas seulement lorsqu'ils statuent sur le fond, mais aussi lorsqu'ils prononcent sur les *incidents*, sur les *exceptions*, sur les *nullités*, sur les *finis de non-recevoir*, etc. en premier comme en dernier ressort,

Carré & Chauveau, T. 1, p. 565, note 1, 4th and T. 4, p. 60 to same effect.

Laurent, vol. 20, n. 22, says:

Il peut dans une même affaire intervenir plusieurs jugements définitifs en ce sens qu'ils décident définitivement certains points débattus entre les parties. Tous ces jugements ont l'autorité de la chose jugée. * * * Quand un jugement, interlocutoire en apparence, décide réellement un point contesté entre les parties, il est définitif et il a, par conséquent, l'autorité de la chose jugée.

Pigeau, Procédure Civile (2 ed.), 1, page 484:

Le jugement définitif est celui qui détermine la contestation.

And then he goes on to say:

Il y a deux observations à faire sur les jugements définitifs: la première, que le jugement peut n'être définitif que sur un ou plusieurs chefs et non sur le surplus: deuxièmement, un jugement peut contenir en même temps une disposition définitive et un avant faire droit.

The effect of the judgment appealed from was to put an end to the issues raised by the counts with respect to which the demurrer was maintained and to that extent the action was finally disposed of and it was "chose jugée."

In *Shields v. Peak*, 8 Can. S. C. R. 579, it was held that a decision on a demurrer to a part of the action only is a final judgment in a judicial proceeding within the meaning of the "Supreme Court Act."

And Mr. Justice Gwynne, who dissented, referring to *Chevallier v. Cuvillier*, 4 Can. S. C. R. 605, says:

The demurrer in *Chevallier v. Cuvillier* (2) was to a particular specified portion of the claim ascertained in the action and the allowance of the demurrer in such a case was undoubtedly a final judgment as to the claim demurred to.

Here the judgment does not, because of the nature of the proceedings, deprive the plaintiff of a particular specified portion of his claim; but as a result of the judgment the plaintiff's action is dismissed with respect to the grounds of action contained in the counts demurred to.

In *Baptist v. Baptist*, 21 Can. S. C. R. 425, it was held that the judgment was *res judicata* between the parties and final on the petition for continuance of the suit and therefore applicable to this Court, and speaking for the Court, Taschereau, J., says, at page 129:

Now though we have held that no interlocutory judgments can be reviewed by this Court under that clause, and though in form, perhaps, this is, in one sense, an interlocutory judgment, yet it is clear that, though upon a side issue, the controversy between the parties has been, as far as can be in the provincial courts, determined and concluded.

Mr. Justice Duff, to whom I am indebted for much assistance in the preparation of these notes, refers me to the case of *McDonald v. Belcher*, [1904] A. C. 429. That was an action brought in the Territorial Court of the Yukon Territory in which the plaintiff Belcher claimed certain sums from the defendant McDonald, among them a sum of \$50,000. At the trial the learned Judge decided adversely to the plaintiffs in respect to this claim and directed a reference with respect to the remaining sums. Judgment having eventually been given upon the referee's report in respect to the remaining claims, an appeal was taken by the plaintiffs to the Supreme Court of British Columbia under 62-63 Vict. c. 11, s. 7 (D.), which authorized an appeal to that Court from the Territorial Court of the Yukon in the case of final judgments.

On the appeal the defendant set up the contention that with respect to the item of \$50,000 the judgment of the learned Judge at the trial being an adjudication upon the dispute between the parties in respect of that item and not having been appealed from within the time allotted by the Act referred to, could not be reviewed. The Supreme Court of British Columbia accepted this contention. On appeal to this Court, the judgment of that Court was reversed. On appeal again to the Privy Council it was there held that with respect to that item the judgment or decision of the learned Judge at the trial was a final judgment. At page 433 Lord Halsbury uses these words:

The particular matter however upon which the case before their lordships depends * * * is whether the question of an indebtedness

by the defendant to the extent of \$50,000 was or was not finally disposed of by the trial which took place before the territorial Judge, that is to say whether the language used by the learned Judge in disposing of the matter constituted a final judgment of the Court.

In the present case it is true that there were not separate demands. There was one conclusion only; but there were several counts, each putting forward an independent title to the relief claimed; and the effect of the judgment appealed from was as regards the counts in respect of which the demurrer was allowed precisely the same as if the action had gone to trial and judgment had been given. The controversy regarding the matters raised by them is as effectually and conclusively disposed of. And it is this quality of conclusiveness which determines the character of a judgment as a final judgment, not its relation in point of time to other proceedings. When by a judgment a distinct and separate ground of action is, to use Lord Halsbury's words, "finally disposed of," it is in the ordinary use of the words a final judgment with respect to that ground of action.

Our decision in this appeal as to the meaning of the term final judgment is, of course, not limited to appeals from the Province of Quebec, but is applicable to those from the other provinces as well. And when it is considered that the "Judicature Act" is now in force in nearly all these provinces and that under it many different kinds of action may be joined together and many different counter-claims submitted by the defendants resulting possibly in many distinct issues alike of law and fact being raised, it will at once be seen how illusory in many cases it would be to put the limited construction contended for upon the word final judgment.

The substantial controversies between the litigants might in many cases be decided by the provincial Courts, but if a single issue of law or fact remained open on the record no appeal would lie to this Court, and if an appeal eventually came here from the judgment of the provincial Court on this final issue we would be precluded in such appeal from hearing or opening the judgments already given in what might well be the most substantial and important subjects of controversy.

I am of opinion that this Court has jurisdiction to hear the appeal and the order of the Registrar is modified accordingly.

Appeal allowed.

Solicitors for the appellant, Bisailon & Bossard.

Solicitor for the respondents, Philippe Roy.

DOMINION OF CANADA.

SUPREME COURT.

WILLIAM CHISHOLM v. EVELYN CHISHOLM.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Parent and Child — Guardianship—Family Arrangement—
Public Policy.*

Appeal from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the defendant.

The plaintiff, Evelyn Chisholm, was left a widow with a young daughter. Her husband had been during the coverture entirely dependent on his father and she was left without any means of support. Her father-in-law, the defendant, offered to educate the child in a convent in Halifax and Montreal, to make provision for her when her education was completed and to give the plaintiff an allowance of \$500 a year, but insisted on being appointed her legal guardian. After resisting for some time the plaintiff consented and the arrangement was carried out. The allowance was paid to the plaintiff for some years and then withheld, whereupon she brought an action for the arrears.

Several defences were pleaded, but the only one dealt with by the Courts was that the transaction amounted to a sale of the custody of her child by the plaintiff, which was against public policy. The trial Judge gave effect to this defence and dismissed the action. His judgment was reversed by the full Court and the defendant appealed to the Supreme Court of Canada.

Nesbitt, K.C., for the appellant. It is against public policy for a parent to surrender the natural rights and duties of guardianship over his child for a pecuniary consideration: *Vansittart v. Vansittart*, 2 DeG. & J. 249; *Hope v. Hope*, 8 DeG. M. & G. 731; *Humphreys v. Polak*, [1901] 2 K. B. 385.

The respondents rely on *Roberts v. Hall*, 1 O. R. 385, which is contrary to the decisions of the Courts in England.

Harris, K.C., for the respondent. If the arrangement has mainly in view the benefit of the child the allowance to the mother will not make it illegal: *Roberts v. Hope*, 1 O. R. 385; *Enders v. Enders*, 27 L. R. A. 56.

THE CHIEF JUSTICE:—The appointment of the appellant as guardian was made by the Court in the exercise of its undoubted chancery jurisdiction on the application of the respondent, an application which the Nova Scotia statute authorized her to make. There is no doubt that the Court could, on cause shewn, set aside the appointment, but I cannot understand how the appellant could succeed in these proceedings in obtaining a declaration to the effect that an appointment made by the Court was void as against public policy. I can find nothing in the agreement itself or in its surrounding circumstances as brought out by the evidence to justify the contention that the family agreement which is attacked was only a scheme to benefit the mother, or that she had any interest which conflicted or could be in conflict with that of her child. On the contrary, I believe that in contemplation of all the parties the contract had exclusively in view the benefit of the infant. There were, as pointed out by my brother Davies, many reasons why an arrangement of this kind should be entered into, and I agree entirely in the conclusions he has reached.

DAVIES, J.:—This was an action brought by the plaintiff, the widow of the only son of the defendant, to recover from the latter payment of an overdue instalment of an annuity agreed to be paid by him to her while she was self-dependent and defendant was able to pay it.

The defence set up was that the only consideration for the payment of the annuity to the plaintiff was the surrender by the mother to the grandfather of the control of the person and education of the child and of the mother's rights and duties to the child, and that such consideration was against public policy and void.

The learned trial Judge, after the hearing, thinking himself bound by the case of *Humphreys v. Polak*, (1901) 2 K. B. 385, sustained his defence and dismissed the action, but on further consideration as a member of the Court of Appeal to which the case had been carried, agreed with the rest of the Court in allowing the appeal and directing judgment to be entered for the plaintiff for the amount of the overdue annuity.

From this latter judgment this appeal was taken to this Court, and while reliance was placed upon the case of *Hum-*

phreys v. Polak referred to, it was strongly pressed upon us that the only consideration for the payment of the annuity to the widow was the agreement by her to the appointment of the grandfather as guardian of the child and that such a consideration was bad and a contravention of public policy as involving a necessary conflict between her interest and her duty as the child's maternal guardian.

I fully agree with the judgment of Mr. Justice Russell, speaking for the whole Court, that the transaction attempted to be at any rate partially impeached in this case was considering the relationships, ages and means of the several parties to it "the most natural and commendable proceeding that could be thought of in the interests of the child," and that the guardianship of the child which was insisted upon by the grandfather was "desired merely as a guarantee that the child would finish her education at the convent." I also agree with the Supreme Court of Nova Scotia that the case of *Humphreys v. Polak*, before referred to, has little or no bearing upon the only point to be considered in this case.

It must be always borne in mind that the contract or agreement sought to be avoided in part by the defendant here was a family arrangement and one agreed to be, on the whole, of a most natural and commendable kind. On the one hand we have a grandfather, stated to be a wealthy man, and on the other an only child of his only son who was dead and whose widow, the plaintiff, was in delicate health and without any means of support for herself and child except her own earnings. Everything that her deceased husband had left was included in the sum of \$500 realized from the sale of his furniture. She herself, after her husband's death, had gone to her people in the United States, taking, of course, her young child, then not a year old, and was living with her parents. They were all Roman Catholics, and the grandfather was very desirous that his only grandchild should be educated in a convent somewhere in Canada. The daughter-in-law, as can be gathered from correspondence, contemplated going to Boston as soon as her health permitted to study nursing. She

hoped to make a good nurse, work hard and give poor Will's little girl a good education.

Now it was not a good education such as is generally understood in Boston, that is a good public school education, that the grandfather desired for his grandchild. He wanted

her to have such an education and training as is imparted in the convents of Halifax and Montreal, of which he knew something and which included a religious education in that branch of the Christian religion to which he belonged.

From the evidence it appeared that at and from the time of his marriage till his death the defendant's son was an invalid and "absolutely dependent on his father." The grandfather recognized his moral responsibility towards his grandchild and was eager and anxious to discharge it, but not unnaturally desired that so soon as the child was old enough to enter the convent as a boarder, mother and child should come to Canada and place the child in one of the convents named by him

and allow her to remain there until she had finished her education.

In his letter, which forms the basis of the contract, he goes on to say:

And after you place her in either convent, I will allow yourself \$500.00 per annum paid quarterly in advance so long as I can do so whilst you are self-dependent. If you think Ruth is too young to be placed in a convent now you can keep her where she is for a while, but I require that she will be placed in either convent not later than the first of September, 1898, where she is to remain until her education is finished. I will pay all her necessary bills for her education at either convent until she has finished her education, and after she has finished her education, I will allow her a sum yearly to keep her respectably until she is of age, and then I will make a suitable provision for her, but for all this *I require to be appointed her guardian as a guarantee that her education shall be continued in the convent until she has finished it. You see I have no desire to part you from your child*, as you can live in either place with her, or in any other place you may wish. I merely wish to do what I consider is for her welfare; she will be taken care of in a convent, as well as you can take care of her. When you were sick some one else had to take care of her, and if you go to Boston you will have to leave her behind you for someone else to take care of her.

Now it seems to me to be plain that this family arrangement proposed and subsequently carried out involved the coming of mother and child to Canada, and the education of the latter in a selected convent, the right of the mother to accompany and remain in the same city where the child was placed and where she could, during the convent vacations, look after the child and expend for its benefit the allowance agreed to be paid by the grandfather "to keep her respectably until she was of age." So far from separating mother and child, the letter clearly contemplated their being together.

You see (he says) I have no desire to part you from your child, as you can live in either place with her or in any other place you may wish" * * * "For all this (he continues) I require to be appointed her guardian as a guarantee that her education shall be continued in the convent until she has finished it."

The arrangement contemplated, as I say, the abandonment of the project at one time entertained by the mother of studying nursing in Boston so as to enable her to maintain and educate the child there, and instead the maintenance and education of the child in a named religious faith and in a named convent in Canada with the mother's presence near the child so as to enable her to discharge the many parental duties in vacation as well as in term which are required by a child in a convent at a mother's hands. Parental pride seemed to have had naturally a strong controlling influence with the grandfather in suggesting the family arrangement now sought in part to be avoided.

For my part I can see nothing in that family arrangement to condemn and very much entirely to commend. The substantial motive prompting the grandfather's action was the obtaining of a legal guardianship in himself which should be a guarantee of the maintenance of a system of maintaining and educating his grandchild; mixed with that was the parental pride which moved him to provide for his daughter-in-law's support and avoid the possible scandal of the widow of the only son of a rich man being compelled to resort possibly to some menial employment for her support which would entail separation from the child. The mother, in consequence of the arrangement, changes her residence from one country to another, abandons her contemplated study of nursing, foregoes the right she would otherwise have to the earnings of the child when and during the time the latter should become capable of earning, satisfies the natural parental pride of the defendant by ensuring alike the maintenance of the mother and the maintenance and education of the child in a manner consistent with their relations to a wealthy grandfather, and this without any surrender of the natural duties owing from the mother to her child beyond those involved in the transference to the grandfather of the legal guardianship under the Nova Scotia statute.

If all these family arrangements were indeed a mere cloak to hold and cover up an improper attempt to contravene the policy of the law, as by a natural guardian selling her right as such to another for a consideration, or a mother

formally abdicating alike her rights over and her duties towards her child for a personal benefit to herself, the argument against the validity of the arrangement, so far as it so attempted to contravene such policy, would be irresistible.

Only a feeble attempt was made to suggest such a state of matters here, and from what I have already said, it will be seen that, in my opinion, the basis of the arrangement as a whole was one bona fide for the benefit of the child which not improperly involved considering the extreme youth of the child, and, under the circumstances of the case, provision for the maintenance of the widow.

The facts shew that for years the arrangement continued to be loyally carried out by both parties, and there is nothing on the face of the record or suggested to us why it should now be declared invalid. Such a declaration would be most unjust to the widow as she could not, by any possibility, now be placed in the position she occupied with respect to earning her own living by nursing or otherwise, and it seems to me would also be unjust to the child.

The appeal should be dismissed with costs.

IDDINGTON, J. (dissenting):—However commendable the intentions of the parties to the arrangements out of which this action has arisen, the arrangement is wanting in the necessary legal form or substance to constitute a contract upon which to found an action such as this.

The simple contract it evinces requires for its support a consideration moving from the person seeking to enforce the promise.

The only consideration moving from the respondent to induce the appellant to make the promise relied upon was that which he so tersely put (before this poor mother who shrank so long as she could from yielding to the hard necessity) of surrendering the custody of her child, and in order to accomplish that, of petitioning the Probate Court to appoint him alone as guardian.

If the common law right of custody did not confer on a mother ample and efficacious authority in regard to the custody of her fatherless child, the statute certainly did. R. S. N. S. c. 115, s. 4, is as follows:—

On the death of the father of an infant the mother if surviving shall be the guardian of the infant, either alone, when no guardian has been appointed, or jointly with any guardian appointed by the father.

I can find no power in that Court to substitute another for this statutory guardian so long as she lives.

Section 5 enacts that in default of a guardian being appointed by father or mother, or such an appointee refusing to act, the Court may appoint a guardian.

(2) And if the infant is fourteen the Court shall appoint his nominee.

(3) But if under that age the executor or administrator of an estate the child is interested in or next of kin may apply and Court appoint.

None of these seem applicable, assuming, what I gravely doubt, that the Court has such power of substitution during the lifetime of the mother, especially where no estate existed and no fault to be found with the character of the mother, what was her legal position or what were her duties in that respect?

True, it was urged, she had herself a power of appointment under the statute, but that also is matter of the gravest doubt.

But assume it exists, what again is her position? What were her duties in exercising such power?

In making such an appointment, or bringing about such an appointment, or taking any part whatsoever in its creation, the mother as statutory guardian must be taken to be acting in discharge of her legal duty, and cannot rid herself of the obligation to discharge such duty cast upon her.

She has no more right to sell the guardianship of her child than she has to sell her child.

The law has been so modified by statute in Nova Scotia as to render inapplicable some of the legal propositions contained in cases cited to us.

The point of view has been shifted a bit. The underlying principle of the cases remains untouched. A consideration consisting only in the discharge of such a duty is no consideration in law upon which to found an obligatory promise and claim an actionable breach thereof.

It seems to me idle to try and conjure up some other consideration than that so plainly written on the face of the correspondence in evidence, which forms such contract as there is.

It is not a case where the real consideration was doubtful, where it had to be found in the acts of the parties, and inferences had to be drawn, which might trace it out in one implication, rather than another, and if more than one existed

(one being illegal but clearly severable) there might yet be found room to attribute the promise to some valid consideration, rather than impute an intention to violate public policy or morality.

In the alternative put before us there is either no consideration or an illegal consideration.

The substitution of the appellant for the respondent was all he valued.

It involved and carried with it all else, including the many things suggested by his counsel in argument, as possible considerations.

She gave him nothing else he valued. Her change of purpose as to her course of life or place of residence or habit of conduct was not stipulated for by him in any way.

He cared only for one thing, and that was the mastery of the custody of the child.

How can we attribute to such a case upon the facts presented some other form of consideration than that which he who dictated the bargain specifies?

I do not assume that there was any gross impropriety in the arrangement, but when I am asked to find in it a necessary and legal consideration, I cannot do it.

I can conceive of such an arrangement being submitted to a Court empowered to pass upon it as a preliminary to its adoption and being approved of and become thereby valid. In such a case the Court might become the keeper of the conscience of the guardian in discharging her duties where interest might lead one way and duty another.

I would allow the appeal.

MACLENNAN, J.:—I concur in the opinion of Mr. Justice Davies.

DUFF, J. (dissenting):—I much regret that in this case I am unable to agree with the decision of the Court below. Assuming that the Legislature of Nova Scotia has, by c. 115, R. S. N. S., invested the mother of a child whose father is dead with the power to appoint within her lifetime a guardian of its person, it is clear that the mother is intrusted with that power as a trustee for the benefit of her child; and likewise with respect to any application to the Court of Probate for the appointment of a guardian under the 5th section of

the statute, or any such application to the Supreme Court of Nova Scotia to which she may be a party, the mother in relation to her child acts in a fiduciary capacity.

Now there is a long settled principle of English law which is stated by Lord Cranworth in these words:—

No one having duties to discharge of a fiduciary nature shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. *Aberdeen Railway Co. v. Blaikie*, 1 Macq. 461, at p. 471.

That principle seems to me to apply to this case and to govern the decision of it. It can be nothing to the purpose that one be satisfied in the particular case that there has been no consciousness of wrong doing, that in fact the person occupying the fiduciary position was actuated only by a sense of duty, or that the particular arrangement was in fact as well as in intention for the benefit of the cestui que trust. The rule is a rule of public policy and is

based on the consideration that human nature being what it is, there is danger in such circumstances of the person holding the fiduciary position being swayed by interest rather than duty.

Bray v. Ford, (1896), A. C. at p. 51, per Herschell; therefore "it applies equally even though it be shewn that no advantage has been taken. The rule is made general in order to prevent the danger arising from the difficulty of disproving in particular cases that duty has given way to interest. See per Lord Eldon in the leading case *Ex parte Lacey*, 6 Ves. 625;" per Rigby, L.J., *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, at p. 442.

For these reasons I think the defendant's promise to pay the sum of \$500 yearly to the mother resting upon the consideration of her undertakings respecting the education and guardianship of her child, and upon that consideration alone, is such a promise as, under our law, the Courts cannot enforce.

Appeal dismissed with costs.

W. H. Fulton, solicitor for the appellant.

W. A. Henry, solicitor for the respondent.

NEW BRUNSWICK.

CIRCUIT COURT.

DECEMBER 12TH, 1907.

CURRAN v. O'LEARY.

*Contract—Sale of Goods—Manufactured Lumber—Breach—
Damages.*

Action on lumber contract tried before Mr. Justice LANDRY without a jury at the Kent Circuit in November last.

J. D. Phinney, K.C., and G. A. Hutchinson, for plaintiff.

M. G. Teed, K.C., and H. H. James, for defendant.

Judgment in favour of defendant for \$30.89 was now delivered by

LANDRY, J.:—A written contract was entered into by which the plaintiff engaged himself to supply the defendant with dimension hemlock lumber, and with all his output of boards, of both hemlock and spruce, which contract specified the quality of such boards. A time and place for such delivery was named in the agreement. The full quantity of hemlock was never delivered. Boards were offered but never accepted by the defendant. The quantity of hemlock to be supplied was at least 50 M of 2½ in. x 4 in. x 10 ft. and at least 150 M of 2 in. x 4 in., 2 x 6, 2 x 8, 2 x 10, averaging 14 ft. long. Of the first only 15,509 was accepted by the defendant; of the second only 125,158 was accepted, and this latter quantity only averaged from 12.6 to 12.9 in length instead of 14.

At the prices agreed on, in case the contract were filled, the 140,667 sup. ft. delivered amounted at \$10, to \$1,406.67. The plaintiff received in all \$1,117.28. He sued for the balance, between \$1,406.67 and \$1,117.28, viz., \$289.38, claiming that if the contract was not filled it was through the defendant's default. He also claimed damages for the breach of contract on the part of the defendant, as follows: Loss on 30 M refused by defendant, at \$2.00—\$60.00; loss on 45,000 of spruce and hemlock boards refused by defendant at \$2.00—\$90.00 paid for repiling timber so refused by defendant, \$17.00, ditto tallying \$10.00, expenses to P. E. I. to sell

boards \$100.00. There is no dispute whatever as to quantity of lumber received and accepted, or as to amount of payments or set-off, except as to two items of set-off, viz., \$4.38 and \$5.25, paid to two men who helped tallying and loading boards shipped to P. E. I. by plaintiff. The contest is principally over breaches of contract. The terms of the contract as to time of delivery, is on or before the first of June. As to what was actually delivered no objection is made by the defendant as to time, and no claim is made by him for damages or reduction of damages by reason of the time of delivery of what was received. Two principal points are at issue between the parties: 1st. By whose default was the hemlock dimension lumber delivered short of the contract? 2nd. By whose default were the boards not delivered or received? I find as a matter of fact that it was in both cases the default of the plaintiff. As to the dimension lumber he undertook to deliver it by the first of June on the Nicholas river wharf. Afterwards the defendant, by his acts and consent, waived these two conditions in two respects:—

1st. He extended the time for delivery. 2nd. He agreed to accept at Jardines', instead of at the wharf, all quantities required to fill the contract, and not delivered at Nicholas river wharf. There being no period fixed in this changed condition, I find that this latter verbal agreement was an extension for a reasonable time. The plaintiff made with Jardines some arrangement, quite uncertain as to time of delivery, and not definite as to quantity, to cut dimension lumber for the defendant. The defendant was aware that the Messrs. Jardine had undertaken to cut some of the dimension lumber. The exact quantity cut by the Messrs. Jardine is not clearly established; nor is the time when they commenced to cut or when they stopped, made quite clear. To make up the full quantity required to fill the contract, the Messrs. Jardine should have manufactured 34,491 sup. ft. of $2\frac{1}{2}$ in. x 4 in. x 10 ft., and 24,842 sup. ft. of 2 x 4, 2 x 6, 2 x 8, and 2 x 10, not less than 10 ft. long and averaging at least 14 ft. It does not appear that the Messrs. Jardine ever knew exactly how much they were to so manufacture to complete the plaintiff's contract. At most the Jardines manufactured, taking their own figures as correct, 10 M of $2\frac{1}{2}$ and 16 M of the smallest dimension. The defendant says that he never was notified that the lumber was ready at Jardines', that he never knew they were to cut any of the $2\frac{1}{2}$. He further says he went early in

October to ascertain if any was ready, and was told that some was ready, which some was shewn to him, and that the quantity so shewn to him was so small as to make it not worth while to go after it, and so insignificant as not to change the average length furnished by the plaintiff to the extent of half an inch. That finding such a condition of things in existence at that late season, he told the Messrs. Jardine he would not take any or not to cut any more. Evidence was given by the plaintiff that in August the defendant told the Messrs. Jardine not to cut any more, and this is the fact relied on as establishing a breach of contract by the defendant entitling the plaintiff to stop filling his contract at that point, and to be paid for what he had already delivered, which breach of contract entitles him, he claims, to damages for the defendants refusing to receive the balance of the dimension lumber. I cannot find that the defendant ever knew or was ever notified that the lumber was ready for him, nor can I find that it ever was, in reality, all ready for him—nor do I find that before October, by act or word, he justified the non-fulfilment of the balance of the contract by the plaintiff as to the dimension lumber. I find, therefore, that the plaintiff did not, within a reasonable time after the extension of time, provide the quantity of lumber called for by his contract, and that the non-fulfilment, in that particular, was not by the default of the defendant. As to the boards, the failure to fill the contract was on the part of the plaintiff, not as to time of delivery, but particularly as to quality and partially because of non-delivery on the wharf. The quality offered in a general way, was not such as contracted for, and the defendant was justified on account of the quality in refusing the boards. There may have been, and I have no doubt there was, some of the boards, both hemlock and spruce, that were offered that came up to the quality bargained for, but how many of such boards were so within the contract was not proven. With the proof before me, I find that the quantity of boards offered coming up to the contract was relatively small, and so mixed with boards not coming up to the standard bargained for that it was unreasonable to expect the defendant to cull them from the inferior ones. On the whole I find defendant justified in refusing the boards as a whole.

My findings on the facts are further:—

Hemlock lumber delivered and accepted of the 2½ in. dimension, 15,509 at \$10.00.....	\$ 155 09
Of the other sizes, 125,158.....	1,251 58

Total to which plaintiff is entitled.....\$1,406 67

Loss: Damages suffered by the de- fendant by reason of non-delivery of 34,491 sup. ft. of the 2½ in. lumber contracted for at \$4.....	\$ 137 96
Ditto, on 24,842 sup. ft. of smaller dimensions at .75	18 63
Ditto, for loss and breach of contract on short average of first cargo....	143 60
Ditto on second cargo	29 72
Cash paid by defendant.....	1,100 00
Rubber boots.	4 25
1 salmon.	1 00
Duster.	2 40

Balance due defendant \$ 30 89

I disallow the defendant's claim for damages on account of the non-delivery of boards. My interpretation of the contract as to boards is, that the plaintiff was to deliver his whole output of boards of the quality specified. The evidence is that the plaintiff offered his whole output. He therefore filled that part of the contract. It was the defendant's right under the conditions detailed in evidence and touched upon herin to refuse the boards, but he could not require the plaintiff to provide him other boards.

I also disallow the two items of set-off paid by the defendant for tallying and helping to load the schooner for the plaintiff. There is no evidence of any authority by the plaintiff to the defendant to supply such boards. The request received by the defendant to supply the work was from the captain of the schooner. The evidence is not such as to justify me to conclude that the plaintiff is responsible to the defendant. The burden of proof was on the defendant to establish that. He failed to do so.

The proof is that the defendant suffered the loss of \$143.60 on the sale of the first cargo, because of the absence of the average, and of \$29.72 on the second cargo for the same reason. I find the plaintiff responsible for loss on account of

short size on these two cargoes, and I assess the damages at \$143.60 and \$29.72 respectively, because I believe these amounts reasonable, and the loss suffered fairly chargeable against the plaintiff. I order a verdict for the defendant, and I assess the damages at \$30.89.

NEW BRUNSWICK.

SUPREME COURT IN EQUITY.

BARKER, C.J.

APRIL 21ST, 1908.

BOYNE v. BOYNE.

Life Insurance—Will—Fund for Payment of Legacies—Life Insurance Act, 5 Edw. VII. (1905) ch. 4—Re-apportionment—Election—General Estate.

H. A. McKeown, K.C., for the plaintiffs.

W. Watson Allen, K.C., for the defendant.

Special case stated for the opinion of the Court.

BARKER, C.J.:—The plaintiffs are the executors of one Gordon Boyne, who died on the 15th December, 1907, having made a will dated February 17th, 1905. He left him surviving his wife, the above named defendant, and one son and one daughter. Some years previous to the date of his will, Boyne had insured his life in the Mutual Life Insurance Co. of New York by policy No. 1,399,811 for the sum of \$1,500, which by the terms of the policy, was made payable to the defendant his wife. At the time of Boyne's death there was due on this policy \$1,316, after deducting a small sum which had been borrowed on the policy from the company. This sum has been paid to the executors, who hold it subject to the direction of this Court. The testator had another insurance on his life for \$1,000, with the Equitable of New York, and at the time the will was made he had some \$1,300 on deposit, at interest, in the bank of New Brunswick in the name of himself and wife. At the date of his death, however, the sum had been reduced to \$58.40. The testator, by his will, gave a legacy of \$1,100 to his wife—

\$500 to his son—\$500. to his daughter, and \$500. to an adopted son. The legacies altogether, including those I have just mentioned, and a number of small amounts given to strangers and charities, amounted to \$3,275, and the testator made the following provision as to their payment—“All of the foregoing bequests to be paid out of the following insurance on my life and cash on deposit in bank.

Policy No. 204,755, in the Equitable Life Insurance Company of New York, for one thousand dollars, \$1,000.00.

Policy No. 1,399,311 in the Mutual Life Insurance Company of New York, for one thousand five hundred dollars, \$1,500.00.

Cash on deposit in Bank of New Brunswick at 3 per cent. say \$1,300.00.”

The remainder of the estate consists of another policy in the Mutual Life, for \$1,000, and a legacy of about \$1,440, coming from Boyne's father's estate, and payable on the death of his mother.

The principal point involved is what effect, if any, the will has had as to the disposal of the money payable on the \$1,500 policy, in the Mutual Life of New York. The plaintiffs' contention is, that by the terms of the will the widow has lost all benefit under the policy as the sole beneficiary mentioned in it, except what she may derive as a legatee, in common with the other legatees, from the fund created by the moneys derived from this policy and the other moneys making up the fund of \$3,800, mentioned in the will. Failing this the plaintiffs contend that the will operated as a reapportionment of the policy moneys between the wife and children of the testator under the provisions of the Act of Assembly, 5 Edw. VII. chap. 4. (1905), known as the Life Insurance Act. As a third contention, the plaintiffs say that if the defendant is entitled to the sole benefit of the policy, she is put to her election whether she will take the benefit of the legacy or the benefit of the policy.

It is not disputed that, except for the will, the policy moneys in question by law belonged to the defendant, who is the sole beneficiary mentioned in the policy, and the only person for whose benefit the policy was originally effected. Section 12 of the Insurance Act distinctly provides that in such a case (there having been no re-apportionment of the money during the assured's life) the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate when the

insurance money becomes payable. This money, therefore, belonged absolutely to the wife, under the contract of insurance, by operation of law, and not in any way under the will. Section 13 of this Act gives to the assured a power, subject to certain limitations, by a written instrument during his life or by his last will and testament, to re-adjust and change the disposition of such insurance moneys. In order to secure that object, so as to accomplish what the Legislature had in view in these sections of the Act, that is to secure such insurance moneys for the benefit of wives and children, possible beneficiaries are by the Act divided into two classes known as "Preferred beneficiaries" and "Ordinary beneficiaries." The first includes husband, wife, children, grandchildren, and mother of the assured. All others are included in the other class, and we find that by s.-s. 2 of sec. 13, the assured in this case, while by his will he might have included his children with his wife (they being of the same class), in a re-apportionment, he could not have diverted all the moneys to a person of a different class or to the assured himself or to his estate. So that it was never competent for the assured, either by his will or by an instrument executed and operative during his life to have, without the consent of the beneficiary, diverted the benefit of the insurance to himself or to his estate, so as to deprive the beneficiary of all benefits under the policy. The assured was therefore precluded from including in any re-apportionment any of these seventeen legatees except his children. None of the others were "preferred beneficiaries." It seems to me impossible to suppose that by the direction in the will which I have quoted, the testator had any idea or intention of making any re-adjustment of this policy money. The fact that he would thereby be attempting to make a policy for \$1,500, pay the beneficiaries \$2,100, seems an answer to any such suggestion. He did have in his mind the creation of a fund from the proceeds of these two policies, and the cash in the Bank of New Brunswick, out of which primarily these legacies were to be paid by the executors and which, as the fund then stood, would have left a surplus of \$525, in the hands of the executors as estate assets. He made no gift or disposal of this particular insurance money; the legacies were as much payable out of the cash in the Bank of New Brunswick as by the insurance moneys, and there seems no more reason for holding that the mere direction to pay these legacies out of the fund derived from these three sources,

operated as a re-adjustment of this insurance money, than there is for holding that it created a trust in favour of the wife and children as to the insurance moneys arising from the Equitable policy for \$1,000. There was really no intention for doing either. In my opinion the defendant as sole beneficiary under the Mutual Life policy is entitled to be paid the \$1,316 due thereon.

The plaintiffs contend that in that event the defendant must be put to her election as to the policy and the legacy of \$1,100. Though the doctrine of election is somewhat refined and not always easy of application, I do not think that this is a case within the principle. In such cases there is always a disposition by the testator of property which belongs to some one else, and which would of course be defeated unless confirmed by the real owner. It has therefore been held that in such a case, if the real owner himself took a benefit under the will, he must accept the will in its entirety, and he was put to his election, whether he would retain his own property and defeat the attempted disposal of it by the testator, or accept the benefit given him by the will and carry out the testator's intentions. See *Cooper v. Cooper*, L. R. 7 H. of L. 53. In all these cases, as Judge Romilly says in *Box v. Barrett*, L. R. 3 Eq. 244, there must be some disposition of property the testator has no right to dispose of. As I have pointed out, neither this policy nor the money secured by it, is in any way disposed of or attempted to be disposed of by this will. It is true that the testator seems to have erroneously considered that at his death these moneys would form part of his estate available for the payment of the legacies mentioned in his will, including the one to his wife, but that does not make a case of election. There is no attempted disposal of these policy moneys to be ratified, because none has been made. There is no donee of the policy to be disappointed, and there is no one claiming it under the will. This, I think, is not a case for election.

The only other question raised is whether these legatees having exhausted the fund out of which the will directs them to be paid, can claim on the general personal estate for the deficiency. I think they can. This fund is not given to the legatees or any of them. It goes into the hands of the executors, subject to the payment of debts, as a fund in course of administering the estate, to be primarily appropriated to the payment of these pecuniary legacies.

In Williams on Executors, p. 921, it is thus laid down: "But where a legacy is bequeathed out of a debt, it will not, generally speaking, be a regular specific legacy, but a bequest, in the nature of a specific legacy, according to the distinction already stated, with regard to legacies out of a particular stock. Such legacies, therefore, are in one sense only specific, viz., that against all other general legatees they have a precedence of payment out of the debt or security; but in another sense they are general, since if the debt be not in existence at the testator's death, or if it be insufficient to pay the legacies, the legatee will be entitled to satisfaction out of the general estate of the testator." *Fowler v. Willoughby*, 2 S. & S. 354; *Paget v. Hurst*, 9 Jur. N. S. 906.

The questions stated for the opinion of the Court are as follows:—

1. Has the said will made any disposition of the said policy No. 1,399,311 in the Mutual Life Insurance Company or varied or altered the apportionment of the same, or is the same payable to Agnes E. Boyne?

Answer. It is payable to Agnes E. Boyne.

Any answer to the second question is unnecessary by reason of the answer to the first.

3. If the will has made no disposition of said policy, is the defendant put to an election, or is she entitled to the legacy also?

Answer. She is not put to election and is entitled to the legacy.

4. In case the fund designated is not sufficient to pay the specified legacies, are the same entitled to rank for any unpaid balance upon the remainder of the estate?

Answer. Yes.

There will be a declaration accordingly.

NEW BRUNSWICK.

SUPREME COURT IN EQUITY.

BARKER, C.J.

APRIL 21ST, 1908.

GOLDEN AND WIFE v. MCGIVERY AND OTHERS,
COMMITTEE OF JAMES MCGIVERY, A LUNATIC.

Interrogatories — Answer — Practice — Irrelevancy—Exceptions.

W. Watson Allen, K.C., for the plaintiff in support of the exceptions.

W. B. Wallace, K.C., and E. S. Ritchie, contra.

Exceptions to the answer of the committee of the lunatic, James McGivery.

BARKER, C.J.:—The bill is filed for the specific performance of a contract said to have been made by the lunatic James McGivery with the plaintiff James Golden, who is a nephew of McGivery, and his wife, by which it is alleged he agreed to convey to the plaintiff Margaret Golden, a certain leasehold property on Brussels street in St. John, in payment of services before that performed by the plaintiffs for him. This was in 1905, and at that time Margaret Golden, as is alleged in the bill, was under treatment in the general hospital, and McGivery proposed that she should then be removed to one of the tenements on the property in question, but that in order to put the property in proper repair McGivery was to collect the rents for a year, put the premises in repair, and in the following April (1906) he was to execute the conveyance. The proposal was accepted. Margaret Golden, as is alleged, was removed to the premises and put in possession under the agreement, and the proposed repairs were commenced by McGivery in May, 1905. In August, 1905, he was taken ill and was sent to the Provincial Hospital for nervous diseases, where he has been ever since under restraint as a lunatic. Proceedings were taken which resulted in an order being made by this Court on the 20th February, 1906, appointing the defendants, James A. McGivery, Reverdy Steeves and Andrew McNicholl, a com-

mittee of the person and estate of James McGivery. This committee subsequently made an application to this Court for authority to borrow money on mortgage of the lunatic's property which was required for the payment of his debts. This authority was given, and in pursuance of it the committee borrowed from the defendant Catherine Dolan \$1,500, and as a security for the money executed to her a mortgage for that sum and interest, on the premises in question, with other property of the lunatic. This mortgage is dated August 22nd, 1906, and was registered about the same time. The bill also alleges that the plaintiff completed at his own expense the repairs in progress when McGivery went to the Provincial Hospital, and that the committee have not only collected the rents from the tenants of the premises in question, but also are seeking to collect rent from him and his wife for the tenement occupied by them.

When the exceptions came on for argument the committee made a motion, of which they had given notice, to set aside the order setting the exceptions down, and I may as well dispose of that here. It seems that the plaintiff's solicitor omitted to specify in a note at the foot of the interrogatories which of them each defendant was to answer. It was contended that in such a case the defendants were not bound to answer the interrogatories at all, and that the answer put in was simply an answer to the bill, as if no interrogatories had been filed, and it was, therefore, not open to exceptions. I do not agree to this construction of the Act. Sec. 44 provides for the foot-note in question, but it is evident to my mind it was intended to avoid the necessity, and therefore the expense of serving the interrogatories on defendants who knew nothing or but little about the matter in dispute, and whose answer, therefore, would serve no useful purpose. No such note would seem of any use where there was only one defendant, and I see no use for it where there are several defendants, and they are all required to answer. I think the fair construction of the section is that, if the plaintiff chooses not to restrict his interrogatories, when he should do so, but puts the defendants or some of them to the expense of answer or portions of answer which are useless, he must run the risk of being made liable to pay the costs in any event under section 45. If, when there are several defendants, the plaintiff omits the foot-note it is equivalent to a requirement that all shall answer, and the taxing officer can deal with the question of costs if the interrogatories have been unnecessary.

There was also some question of waiver by reason of an arrangement to take some evidence, but there is nothing in that.

The first exception relates to an interrogatory founded on an allegation in the bill in reference to the services alleged to have been performed by the plaintiff James Golden to James McGivery, which are put forward as the consideration for the agreement to convey. The answer is, I think, insufficient for not stating the defendant's belief, and I think the exception must be allowed.

The second and third exceptions must, I think, be allowed on the same ground.

The fourth exception is that the defendants have not set forth in full the mortgage to Dolan, and the order of Court under which it was made, as by the interrogatory they were called upon to do. They have set forth in full its date, its registry and all the particulars relating to it. It is difficult to see what purpose is to be served by encumbering the records with copies of documents which are not attacked in any way, and where there is no allegation or suggestion that beyond the fact that they exist, which is admitted, nothing turns upon them one way or the other. The public records and the mortgage itself are both as accessible to the plaintiff as they are to the committee, and while the mortgage is their own conveyance and they must, therefore, know its general terms as they have stated, there is nothing either in the nature of duty or usage which would require them to keep a copy of it. If they had said that they had no copies of the mortgage and order, I should have been disposed to overrule this exception, but they have not done so, and I shall, therefore, allow it.

I think the remaining nine exceptions must be overruled. They are all alike in their character and relate as I think to matters altogether irrelevant to the subject matter of the bill. By section 13 of the bill the plaintiff alleges that the lunatic was possessed of considerable property beside that which he agreed to convey to them, and that the Committee had plenty of property in their hands when they obtained from the Court the authority to borrow, and when they borrowed, to pay off the debts, and in fact there was no necessity for borrowing at all. The bill also alleges that the committee have collected the rents of the property. Based upon these allegations a series of interrogatories have been framed by which the defendants were required to state

the particulars of this property, the amounts due to them, the amount of rent collected by them, the appropriations by them by the moneys received by them, and in fact to give a full account of their dealings with the estate. This whole inquiry, as it seems to me, is wholly irrelevant to any issue involved in this suit, and therefore vexatious. That would certainly be the case if the plaintiffs fail in establishing their contract. But assuming that they do establish it, what has the value of the property in the committee's hands to do with the relief to which they may be entitled? The plaintiff's right to relief does not depend upon the defendant's ability to carry out the decree of this Court granting it. The only relief to which the plaintiffs can be entitled is a conveyance of the property, or a compensation in lieu of it. But the right to the compensation does not depend upon the ability of the committee to pay it. If there is anything in the nature or extent of the property of the lunatic which this Court should think it desirable to know for its guidance in directing the committee as to their disposal of the estate in case the plaintiffs' right to compensation should be established, it can by its officers get the requisite information. In *Francis v. Wigzell*, 1 Maddock 258, the bill was for the same purpose as this, but brought against a man and his wife. There was an interrogatory addressed to the wife whether she had not separate moneys and property of her own to a considerably larger amount than the purchase money, or to some and what amount, the demurrer to this alleging as a ground that the bill made no case entitling the plaintiff to such discovery. The Vice-Chancellor says: "It is admitted that if a similar interrogatory had been addressed to the husband as to his property, or any other party against whom a specific performance was sought, such an inquisition into the circumstances of the defendant would not have been permitted. Is it than a proper question with regard to the feme covert?" Here the defendants admit they have property enough to pay the mortgage. See also *Wood v. Hitchings*, 3 Beavan 504; *Kennedy v. Dodson* (1895), 1 Ch. 334.

It would, I think, be a monstrous proposition to put forward, that if this defendant had not been afflicted as he is but had remained sane, and this bill had been filed against him, he should be subjected to all this inquiry as to his private affairs and their management. Why should this committee be obliged to account for their stewardship to

these plaintiffs simply because they claim to be entitled to a conveyance of a piece of the property in payment of a debt?

The defendant's motion to set aside the order setting down the exceptions for argument will be dismissed.

The first four exceptions will be allowed and the others overruled.

The defendants to have 20 days after service of the order herein as to the exceptions, in which to file amended answer.

As each party has succeeded in part there will be no order as to costs, as to the defendants' motion, or the exceptions.

NOVA SCOTIA.

SUPREME COURT.

TOWNSHEND, C.J.

APRIL 23RD, 1908.

IN RE ESTATE OF JAIRUS HART.

JOHN Y. PAYZANT v. SOPHIA GRACE COLEMAN
ET AL.

*Will—Construction—Investment Securities—Legacy—Interest
Accruing from Investment Funds—Residuary Bequest—
Profits Arising from Sale of Right to Subscribe to Fresh
Shares — Right thereto as between Life and Residuary
Legatees—"Capital"—"Accumulated Profits" Succession
Duty—Commission.*

This case comes before the Court on an originating summons for the determination of certain questions arising under the will of Jairus Hart. The facts involved are stated below, and in the reasons for judgment.

The plaintiff is sole surviving executor and trustee of and under the last will and testament of Jairus Hart, late of Halifax in the county of Halifax, Esquire, deceased, dated the 27th day of January, A.D. 1905, and the originating summons herein was issued on the 31st day of March, A.D. 1908, upon the application of the plaintiff herein, as such surviving executor and trustee as aforesaid, for the determination of certain questions therein set forth and contained, which are right and proper ones to be determined

thereunder. The plaintiff and Levi Hart were appointed executors and trustees of said last will and testament of Jairus Hart, deceased, and probate thereof was granted thereon to plaintiff and said Levi Hart by the Court of Probate for the county of Halifax on the 29th day of October, A.D. 1906. Levi Hart departed this life on the 23rd of December, A.D. 1907, leaving the plaintiff sole surviving executor and trustee, and no one has been nominated and appointed executor and trustee in the place and stead of the said Levi Hart, deceased, under and in accordance with the provisions of said last will and testament, to act with plaintiff.

The said late Jairus Hart by his said last will and testament did, among other things, direct as follows:—

“I direct my executors to set aside and invest in good securities the sum of forty thousand dollars, and to pay the net annual interest and income therefrom to said Sophia Coleman by regular semi-annual payments for and during the term of her natural life, and after her death I direct said executors to pay and transfer said sum of forty thousand dollars, or the investments so set aside, to the University of Mount Allison College at Sackville, New Brunswick, or to the Board of Regents thereof, to be applied and used as they may think best in connection with the buildings of the Mount Allison Ladies' College there situated.

“I also direct my executors to set aside and invest in good securities the sum of forty thousand dollars, and to pay the net annual interest and income therefrom to said Florence Black by regular semi-annual payments for and during the term of her natural life, and after her death I direct said executors to divide said sum of forty thousand dollars, and the investments thereof, and pay over and transfer the same as follows, namely.—

“Ten thousand dollars parcel thereof, to and amongst the child and children of her, the said Florence Black, in equal shares absolutely, and if she leave no children her surviving, then to pay the same to the said University of Mount Allison College to be appropriated towards the liquidation of the debt on the building known as the Owen Museum of Fine Arts in connection with said University.

“And as to another ten thousand dollars parcel thereof to pay the same to the Young Men's Christian Association at Halifax, to be appropriated for the benefit of the pro-

posed new building to be erected by them on Barrington street, Halifax, for the use of their members.

“And as to another ten thousand dollars parcel thereof to pay the same to the City of Halifax to be invested and kept invested by them in good securities, and to appropriate the annual income and interest arising from such investments to the purchase each year of suitable books for the Public Library of the City, but this bequest to the city is made on the following conditions; first, that the said city either before or within a reasonable time after the death of said Florence Black provide a suitable building in the said city for the purposes of a public library, and the storing and preserving of the books belonging to said library, which building shall not be used for any other purpose but that of a public library, except that if at any time it may be considered desirable to have a building sufficiently large to include an art school and gallery or public museum, or both, as well as a library; such a building will satisfy the terms and conditions of this bequest, and also except that by consent of the residuary legatees of this my will expressed in writing, the place where such books shall be stored and preserved may be a different one from that above provided for, and also provided that said city of Halifax, on and after the payment to said city of said ten thousand dollars, take from the income and funds of said city annually a sum not less than one thousand dollars, and expend the same in purchase of additional books for the replenishing and enlarging of said library.

“And as to the remaining ten thousand dollars, balance of said forty thousand dollars, to pay the same to the said University of Mount Allison College to be appropriated for the use and benefit of the said Mount Allison Ladies' College or otherwise, in connection with said University as said University or Board of Regents may decide.

“And as to all the rest and residue of my estate not otherwise hereinbefore disposed of, I give, devise and bequeath the same as follows, viz., one-third equal part to the three following objects to and among them in equal shares, namely: to the Halifax School for the Blind, the Deaf and Dumb Institution at Halifax, and the Protestant Industrial School at Halifax. Another equal third of said residue to the Missionary Society of the Methodist Church of Canada. All the remaining third part to the University of Mount

Allison College at Sackville, towards the Endowment Fund thereof.

"I direct my executors or trustees to pay out of the residue of my estate all money and moneys payable out of my estate to the Provincial Government of Nova Scotia for succession or legacy duty or tax, so that all and every person or persons or objects, legatees and annuitants to whom I have in this my will, devised, bequeathed or given property, moneys, or benefit of any description except as to said residue, may receive the same in full and without any deduction.

"With respect to the two sums of forty thousand dollars, which on the first page of this, my will, I have directed my executors to set aside and invest for the purposes therein named, it is my wish that my executors or trustees shall not be in any way responsible for the depreciation or appreciation of the investments or securities of said respective sums, but that said original investments or such as may be taken in the place of them for the time being shall represent said principal sums so bequeathed, the income whereof is to be paid said annuitants and the investments whereof, for the time being, whether increasing or diminishing, said sums so bequeathed are to be transferred or paid over after the death of said annuitants as provided aforesaid.

"It is also my will that my executors and trustees for the time being, upon whom is cast the duty of collecting and paying over the income on said sums of forty thousand dollars each and attending to the investing and managing of the same shall receive a commission on said income for their services, not exceeding at the rate of five per cent."

The infant defendants, Seymour Roberts Black and Russel Trueman Black, who have appeared herein by John T. Ross, their guardian ad litem, are the children of the defendant, Florence Louise Black, referred to in said last will and testament as Mrs. Florence Black and Florence Black respectively.

The defendants, Sophia Grace Coleman, The Halifax Young Men's Christian Association, The Institution for the Deaf and Dumb at Halifax, The Industrial School and the Missionary Society of the Methodist Church, are referred to in the said last will and testament as Mrs. Sophia Coleman and Sophia Coleman, The Young Men's Christian Association at Halifax, The Deaf and Dumb Institution at Halifax. The Protestant Industrial School at Halifax, and the Missionary Society of the Methodist Church of Canada respectively.

The plaintiff and the said Levi Hart, in his lifetime, as such executors and trustees as aforesaid, in accordance with the directions contained in the said last will and testament, duly set aside and invested the said two sums of \$40,000 each to and for the benefit of the defendants Sophia Grace Coleman and Florence Louise Black, respectively, in good securities to the satisfaction of said two defendants last mentioned.

The corpus of the said trust fund of \$40,000 in favour of the defendant Florence Louise Black includes among other securities and investments twelve shares in the capital stock of the Nova Scotia Telephone Company, Limited, which corporation has since the said setting aside and investing of said two sums of \$40,000 each as aforesaid, increased its capital stock and issued new shares therefor and allotted same pro rata to its present shareholders in the proportion of one new to every five old shares, whereby the plaintiff as holder of said twelve old shares in said corporation has become vested with the right to subscribe for two of said new shares in said corporation, which said right to subscribe is saleable and transferable and has a marketable value and will expire on the first day of May A.D. 1908.

A considerable proportion of the corpus of said two trust funds of \$40,000 each, devised as aforesaid to and for the benefit of said defendants Sophia Grace Coleman and Florence Louise Black, respectively, consists of shares in the capital stocks of certain chartered banks of Canada; It is now and has been for some time past and may continue to be the settled policy of Canadian Banks to increase their capital stocks from time to time in order to enable them to extend their business in proportion to the growth of the country; and certain of said banks, in whose shares a portion of the corpus of both of said two trust funds is invested, have already obtained and secured the necessary authority under the provisions of the Bank Act to increase their capital stocks and to issue new shares therefor, and have now in contemplation the early issue of same which, when issued, will under the provisions of said Bank Act be allotted pro rata among the present shareholders of said bank, and the rights as shall hereafter thereby become vested in plaintiff, as such trustee as aforesaid, to subscribe for his proportion of such new shares will be saleable and transferable and have a considerable marketable value.

The debts and funeral and testamentary expenses of the said Jairus Hart, deceased, and the pecuniary legacies bequeathed by his said last will and testament have been paid, and the estate of the late Jairus Hart, deceased, comes up for settlement in the Court of Probate for the County of Halifax on Wednesday the 22nd day of April A.D. 1908, when the accounts of the plaintiff, as the surviving executor thereof, will then be duly presented for passing and final settlement.

The usual and customary remuneration allowed trustees for the management of trust funds and estates is a commission of five per cent. on the income thereof.

E. P. Allison, for executors.

W. B. A. Ritchie, K.C., for life annuitants.

F. H. Bell, K.C., for remaindermen.

J. A. Chisholm, K.C., for residuary legatees.

TOWNSHEND, C.J.:—The testator left by his will \$40,000 to be set aside and invested in good securities, his executors to pay the net annual interest and income to Sophia Coleman during her natural life, and at her death he directed that the principal sum should be paid and transferred to the University of Mount Allison. A like provision was made for Florence Black.

The executors carried out the directions of the will by investing the two sums of \$40,000 each in bank and other stocks, a list of which has been annexed to the paper herein. Since the investments, some of the companies have decided to increase their capital, and it is anticipated that others may do so. These companies have allotted to the present shareholders a preferential right of taking up the new shares. These rights are valuable, and the holders are entitled to sell them. The question has now arisen, which class of legatees under the will is entitled to the benefit of the money from the sale of these rights—that is to say, the life interest, or the remainder interests, or the residuary estate.

The life claimants contend that the proceeds belong to them as profit or gain issuing from the capital sums directed to be invested, in the same way as if the dividends had been increased the increase would go to their holder.

Those in remainder contend that they are in the nature of capital, and must be invested, and added to the principal, while the residuary legatees claim it belongs to them as part of the residue. I am of opinion that it certainly does not fall

into the residue—the fund out of which it has grown has been set aside and apart from the rest of the estate as directed by the will, and whatever flows or comes from this necessarily belongs to those interested in that fund, and in which the residuary legatees have no interest or claim whatever.

It then rests between the life tenants and the remainder interests.

Cook on Corporations, ch. 33, sec. 559, deduces from all the cases this rule. "The right to subscribe for new shares at par upon an increase of the capital stock which is an incident of the ownership of the stock, does not belong as a privilege to the life tenant, but such an increment must be treated as capital, and be added to the trust fund for the benefit of the remainder men. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust, or sells the right to subscribe for valuable consideration. In either event, the increase goes to the corpus."

This view of the question is sustained with some few exceptions by the American authorities cited by the author.

As I understand *Bouch v. Sproule*, 12 A.C. 385, where all the cases are reviewed, followed by *In re Armitage* (1893), 3 Ch. 337, the result is the same as stated in the above citation from Cook.

This is not a case of undivided profits or bonus which might or might not have been appropriated by the company. It is merely the right to subscribe for fresh issues of shares, or the right to sell them, and as such under the authorities go to the remaindermen. So far as I read, the cases cited by Mr. Ritchie apply to cases of profits or undivided profits or bonus or accumulations of profits which the company has not appropriated one way or the other, but as I do not regard the rights in question as coming under that category, I cannot think they uphold his contention. The citation from 2 Thompson on Corporations, sec. 2193, is certainly in favour of the life tenants, and I am unable to reconcile it with the other authorities to which I have referred. I have examined the reference to Lindley on Companies, p. 545-6, 5th ed., and am not prepared to say positively whether this case is covered by any of the propositions, but assuming, as contended by Mr. Ritchie, it comes under the 3rd, I do not understand from the facts before me that the company here divided its accumulated profits among its shareholders as profits (or without capitalizing them, or treating them as

capital), as I have already said this is not a case of accumulated profits, but a right given to existing shareholders to subscribe more capital, which in itself was an advantage to the holder of the stock. The life tenants are not holders of the stock, but only entitled to the income of such stock or shares—in all other respects the shares are the property of those in remainder with all benefits, and rights accruing therefrom or incidental thereto. The rights of parties in cases of this kind have always been regarded as a difficult question, and in deciding in favour of the remainder interest, I do not feel all the confidence I could wish to have on such an important point.

As to the allowance of commission in view of the terms of the will, and the usual practice, it will be fixed at 5 per cent. on the income. It is somewhat difficult to say out of which fund it should be paid. On the whole, I come to the conclusion it must be paid out of the income, and not out of residuary estate. I so decide (1) because he expressly provided in regard to the succession tax that it shall be paid out of his estate so that the legacies may be received in full without deduction. If the testator had intended the commission also to be deducted it would naturally have been stated in this clause. The fact of his omitting to make any such provision is an argument to shew that he did not intend it. (2) In the clause directing the payment of the commission he expressly provides that for the trouble in investing and managing the principal sums and collecting and paying the interest or income they shall receive a commission on said income for their services. If it was not to be payable out of income, one would expect to find an express direction out of some other fund than income. (3) To make it payable out of the residuary estate would compel the executors to set aside a fund for that purpose or to keep the residuary legatees waiting for an indefinite period—in fact, during the lives of the life tenants, which looking at the whole scope of the will could not have been intended.

The costs of all parties to be paid out of the estate.

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No. 2

DOMINION OF CANADA.

SUPREME COURT.

MAY 4TH, 1908.

THE MONTREAL PARK AND ISLAND RAILWAY CO.
v. LABROSSE DIT RAYMOND.

*Appeal—Jurisdiction—Amount in Controversy—Retraxit—
R. S. C. (1906) c. 139, s. 46 (c).*

Coram, SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, MACLENNAN, and DUFF, JJ.

H. J. Elliott, for the motion.

R. A. Taschereau, contra.

Appeal from the judgment of the Court of King's Bench, appeal side (Sec. 4 E. L. R. 357), affirming the judgment entered in favour of the plaintiff, by GUERIN, J., in the Superior Court district of Montreal, upon the findings of the jury at the trial.

The plaintiff brought the action for damages sustained through the death of her husband caused, as alleged, by the negligence of the defendants, and, by her statement of claim, demanded \$10,000 damages. Issues were joined and the cause set down for hearing upon this demand; the trial being fixed for the 3rd of June, 1907. On 31st May, 1907, the plaintiff filed a retraxit reducing her claim to \$1,999, and gave notice thereof to the defendants and that, at the trial, her claim would be limited to that amount.

By the findings of the jury contributory negligence was attributed to the deceased, but they also found that the accident which resulted in his death had been caused by preponderating negligence on the part of the defendants, and, following the practice in the Province of Quebec, the damages were assessed at \$1,333, after reducing the assessment in proportion to the contributory negligence of the deceased. The trial Judge ordered judgment to be entered accordingly in favour of the plaintiff, with costs, and this judgment was affirmed by the judgment appealed from.

On the appeal to the Supreme Court of Canada, the respondent (plaintiff) moved to quash the appeal on the grounds, (1) that the amount in controversy was only \$1,999, to which the retraxit had reduced the plaintiff's demand, and (2) that the case submitted to the jury and in the Courts below and upon which the judgments therein had been rendered was one on a claim for \$1,999 only, and, consequently, under the limitation provided by s. 46 (c) of "The Supreme Court Act," R. S. C. (1906) c. 139, that the Court was not competent to entertain an appeal.

After hearing counsel on behalf of the parties, the Court allowed the motion and quashed the appeal with costs.

Appeal quashed with costs.

PRINCE EDWARD ISLAND.

SUPREME COURT.

EASTER TERM.

MAY 19TH, 1908.

ALBERT E. MCKINNON v. SOLOMON C. CLARK.

Action of Trespass to Land—Plea of Right of Way under Lost Grant—Presumption by Twenty Years User—Owner of Dominant Tenement a Tenant for Years—Demurrer to Plea Sustained.

D. C. McLeod, K.C., and W. E. Bentley, for plaintiff.
Donald McKinnon, for defendant.

SULLIVAN, C.J.:—This is a demurrer to the defendant's fourth and fifth pleas to the plaintiff's declaration, which is for trespass to land. The pleas allege the making of a grant of a right of way over the plaintiff's land by a person who was possessed of a term of years in the plaintiff's land to a person possessed of a term of years in land adjoining the plaintiff's land, and a justification of the trespass complained of in the use of that way by the defendant as the servant of the assignee of the grantee thereof.

The contention for the plaintiff is that the pleas in question are applicable only to a lost grant to be presumed from user and enjoyment of the alleged right of way for twenty years or upwards, and as such are bad; first, because such a grant can be presumed only against the owner of the fee of the land sought to be made the servient tenement, and not against a tenant for years of such land as the

maker of the grant pleaded is alleged to be, and secondly, because such grant can only be presumed in favour of the owner in fee of the land sought to be made the dominant tenement, and not in favour of a tenant for years as the grantee of the lost grant pleaded is alleged to have been.

In the case of *Wheaton v. Maple & Co.* (1893), 3 Ch. 48, this view is clearly stated by Lindley, L.J., in his judgment, in which he deals with the question of the possibility of acquiring an easement as against a tenant of land by presumption of a lost grant, as follows:—

“I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements or a lost covenant by such a person not to interrupt in the case of light, and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land and not as annexed to it for a term of years. Although, therefore, a grant by a lessee of the Crown, commensurate with his lease, might be inferred as a fact, if there was evidence to justify the inference, there is no legal presumption as distinguished from an inference in fact in favour of such a grant. This view of the common law is in entire accordance with *Bright v. Walker* (1 C. M. & R. 211), where this doctrine of presumption is carefully examined.”

This view of the law is adopted by the Court of Appeal in the case of *Kilgour v. Gaddes* (1904), 1 K. B. 457, in which the question was regarding an easement of a right of way. Mathew, L.J., in his judgment in that case says:—

“In this case the fee simple of the supposed dominant and servient tenements belonged to the same person. It is clear that, under such circumstances, an easement like a right of way could not have been created by prescription at common law. Such an easement can only be acquired by prescription at common law where the dominant and servient tenements respectively belong to different owners in fee, the essential nature of such an easement being that it is a right acquired by the owner in fee of the dominant tenement against the owner in fee of the servient tenement. If authorities were necessary for that proposition the case of *Wheaton v. Maple & Co.* ((1893), 3 Ch. 48), and 2 Wms. Saunders 175 (b), (i) would suffice.”

An easement, such as a right of way, may of course be created by a grant for a term of years, but the pleas under review do not apply to such a case. The only question in this case is whether making the right of way the foundation of the defendant's claim, that right has been stated legally. I am of opinion, upon the authorities which I have cited, that the defendant's 4th and 5th pleas are bad.

Judgment on the demurrer will be for the plaintiff with costs.

FITZGERALD, J.:—In this case the fourth and fifth pleas are framed pleading the acquisition of an easement by lost grant, a right of way acquired by a twenty years' user under the common law, as we have no statutory prescriptive right in this province.

They set forth that the dominant and servient owners were possessed severally of a leasehold interest in the adjoining lands, and no mention is made of the owners in fee of either lands.

The plea is demurred to as bad, as setting forth a lost grant by a lessee for years in support of a prescriptive right of way.

Bright v. Walker, 1 Cr. M. & R. 211, as approved and understood in the Court of Appeal in Wheaton v. Maple (1893), 3 Ch. 48, and Kilgour v. Gaddes (1904), 1 K. B. 45, leave I think little doubt as to the law.

These two authoritative decisions review and distinguish most of the previous and somewhat conflicting judgments. Lord Justice Lindley, in the first case, considering the rights of the parties at common law, says:—

“I am not aware of any authority for presuming as a matter of law a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant by such person not to interrupt in the case of light, and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against any grant or covenant not to interrupt by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land and not as annexed to it for a term of years. This view of the common law is in entire accordance with Bright v. Walker, where this doctrine of presumption is carefully examined.”

The Court of Appeal in Kilgour v. Gaddes quoted with approval the above judgment of Lord Lindley. Both Courts

also upheld the dictum of Baron Parke in *Bright v. Walker*, that no title at all is gained by a user which does not give a valid title against all persons having estates in the locus in quo; and that during the period of a tenancy the exercise of an easement will not affect the fee; in order to do that there must be that period of enjoyment against an owner in fee.

It is unnecessary in my opinion in view of these authorities, to review further decisions. These pleas are clearly bad, and judgment must be given upholding the demurrer.

HODGSON, J.:—I concur in the judgment of Mr. Justice Fitzgerald.

NEW BRUNSWICK.

BARKER, C.J.

FEBRUARY 25TH, 1908.

SUPREME COURT IN EQUITY.

M'GAFFIGAN ET AL. v. FERGUSON ET AL.

Mortgage—Deed—Fiduciary Relationship—Undue Influence—Pressure—Misrepresentation—Imprudent Contract—Voluntary Gift—Insanity of Donee—Promissory Notes.

Argument was heard November 25th, 1907.

M. G. Teed, K.C., for the plaintiffs.

L. A. Currey, K.C., and N. A. Landry, K.C., for the defendants.

BARKER, C.J.:—This suit was commenced in the name of Helen Davidson, a person of unsound mind, not so found, by William G. Bowie as her next friend. Helen Davidson was the widow of William Davidson. She died April 7th, 1905, at the age of eighty-two years, leaving a will dated March 6th, 1900, by which she appointed the Reverend Joseph A. Babineau and the defendant William Ferguson executors. They both renounced, and the present plaintiff Elizabeth McGaffigan, who is a daughter of Helen Davidson, applied for and obtained letters testamentary cum testamento annexo, and the suit is now being prosecuted in her name coupled with others in like interest. It appears from the evidence that Wm. Davidson for many years previous to his death carried on a considerable business at Tracadie. He died in 1890 leaving him surviving his widow and two children, the present plaintiff Elizabeth McGaffigan, and a son James, one of the defendants. He left a

will dated December 26th, 1889, by which he appointed his wife executrix, and the defendant, Wm. Ferguson, executor, to whom letters testamentary were granted. By this will all the testator's property with the exception of a legacy of \$50 given for religious purposes, and another of \$500 given to his daughter, was given absolutely to his wife. The estate consisted of two lots of land at Tracadie—one known as the homestead lot on which Davidson lived and which contained some 25 acres, the other known as the Arsenault lot which contained two or three acres. The appraisers valued these lots, with the buildings on them, at \$2,260. There was also personal property consisting of farm stock and house furniture valued at \$940 cash in the savings bank, \$1,000, and \$3,000 in Provincial debentures deposited at the agency of the Bank of Montreal at Chat-ham. So that the whole estate at a moderate valuation was worth \$7,000, for there were substantially no debts. Wm. Ferguson himself estimated that the income derivable from the estate was sufficient for the support and maintenance of the widow Helen Davidson, in view of her habits and conditions in life. By her will she disposed of her property as follows: she gave \$70 for masses, and the residue to her son James for his life, then to James' wife for life or until her marriage, and then to James' children living at the time of his death for their lives, and on their death to the superioress of the Corporation of the Hotel Dieu St. Joseph of Tracadie forever. This will, which is dated March 6th, 1900, and of which Wm. Ferguson is named an executor, is witnessed by him, and it was drawn by him. So that he had personal knowledge of its contents. James Davidson was a man of exceedingly intemperate habits, and though not without business capacity, he was reckless in the management of his affairs, and squandered what he had without thought for the future. In 1898 he became insolvent, and made an assignment for the benefit of his creditors. His liabilities amounted to about \$8,000, in which was included an amount of \$477.80 said to be due Wm. Ferguson.

On the 22nd March, 1899, Helen Davidson executed a mortgage to the defendant Wm. Ferguson to secure the sum of \$822.90, with interest at the rate of 7 per cent., payable in four years, on the Arsenault lot. This mortgage was not registered until March 15th, 1901.

On the 28th December, 1899, Helen Davidson, for an expressed consideration of \$600, conveyed the Arsenault lot to Philip Arsenault, under which he went into possession,

and remained in possession until his death, which took place after this suit was commenced. Philip Arsenault was a son-in-law of Wm. Ferguson, and when James Davidson made his assignment in 1898, Arsenault claimed as a creditor for some \$355.11. This conveyance was registered January, 6th, 1900, about fourteen months before the registry of Ferguson's mortgage on the same property. According to Ferguson's evidence \$600 was the full value of the lot and other witnesses confirm this opinion.

On the 29th December, 1902, James Davidson and Helen Davidson executed a mortgage to the defendant Wm. Ferguson to secure the sum of \$1,250.97 payable in five years with interest at 5 per cent. on the homestead lot. This mortgage shows on its face that the consideration was money due by James Davidson and in no way by his mother, who was sole owner of the property. It was registered January 6th, 1903. Default having been made under this last mortgage, the defendant Wm. Ferguson as mortgagee proceeded to realize the amount, and for that purpose he gave a notice of sale in October, 1904, to take place at Tracadie on the 17th January, 1905. This bill was then filed, the sale was restrained and the object of this suit is to set aside these three conveyances, on the ground that they were all procured from Helen Davidson by undue influence, when she was enfeebled by old age, without independent advice and unable from mental weakness to understand their nature or effect, and in disregard of a duty which both James Davidson and Wm. Ferguson, for whose benefit they were made, owed to Helen Davidson arising out of a fiduciary relation in which, it is said, both of them stood to her. When the notice of sale was given in October, 1904, Helen Davidson was 82 years of age and weakened in body and mind. She was without any means of support of her own. Her money and personal property had all disappeared. A part of her real property had been sold to Arsenault, and the remainder of it had been mortgaged to its full value to Wm. Ferguson. James Davidson and his family were without means of support. Of all the money belonging to Helen Davidson which had passed through Wm. Ferguson's hands, there only remained \$20 which he had kept to pay her funeral expenses. In this condition of things the present plaintiff Mrs. McGaffigan came to the rescue. She arranged with the Convent authorities to take her mother to board, for which she was to pay \$20 a month besides cost of clothing. The old lady, with

a young girl as attendant, was accordingly transferred to the Hotel Dieu in October, 1904, where she remained until she died in the following April. Mrs. McGaffigan paid some \$150 under her arrangement, and William Ferguson appropriated the \$20 in defraying the cost of the funeral.

There are distinctions between these three transactions which make it necessary to discuss them separately. As to the first mortgage, Wm. Ferguson in his answer claims that there is due him the full amount of principal and interest secured by both mortgages. The evidence however clearly shows, and his own books show, that the \$1,250.97 secured by the last mortgage, was the total sum due by James Davidson at that time on all accounts. It is unnecessary to go through the books to prove this, because Ferguson's counsel very properly admitted that from the evidence this was the fact. They however allege that whereas the last mortgage was given for an existing debt from James Davidson, the first was given to secure an advance made to Helen Davidson, and though it was made for James Davidson's benefit, the debt was Helen Davidson's. And the agreement was that if any balance remained unpaid on the first mortgage which formed a part of the \$1,250.97, to that extent at all events the second mortgage secured a loan to Helen Davidson herself. I do not think the evidence sustains the defendants' contention on this point. What took place was this: When James Davidson failed in 1898 he owed some \$8,000. Of this sum something over \$2,000 was due his mother—\$335.11 was due to Philip Arsenault and \$177.80 to Wm. Ferguson. His assignment was made on the 10th November, 1898, but before it was made a consultation took place between James Davidson and William Ferguson, at which it was arranged that a cash compromise of 10 per cent. was to be offered the creditors, that in the event of its acceptance, Ferguson was to supply the money on being secured by Helen Davidson, and Ferguson and Arsenault his son-in-law—one of whom became the assignee and the other an inspector of the estate—were to be paid their claims in full. The meeting of creditors was held, the offer of compromise was accepted by nearly all the creditors, and the arrangement made with Ferguson and Arsenault was not made known to the other creditors. In order to carry out this compromise, Ferguson sent in a tender for the purchase of the insolvent's estate for \$1,000. That was the sum which Ferguson estimated would be required to pay the 10 per cent. and other charges.

His tender was accepted, he took possession of the estate, property and assets, and the business went on as before, not in James Davidson's name, for some of the dissenting creditors had obtained judgments, but for his benefit. In the following March James Davidson and Wm. Ferguson settled upon the amount for which the mortgage was to be given at \$822.90. This sum included not only the compromise actually paid, but Ferguson's claim in full, as it was then settled, at \$241.70, his fees as inspector of the estate and other amounts, for which according to his own version of the transaction, Mrs. Davidson never agreed to become security in any way. In addition to this, on the 14th day of March, eight days before the mortgage was executed, Ferguson gave a power of attorney to James Davidson, authorizing him, in the name of Ferguson and for his sole benefit, to continue, operate, manage and transact the general mercantile and fish business lately operated and transacted by the said James Davidson at Tracadie, with power to Davidson, in Ferguson's name and as his agent and attorney, to sell on credit or otherwise whatever goods, chattels, wares and merchandise then there, or that might at any and all times be put there by Ferguson or by Davidson for him. Included in this property were fishing boats, tackle and fishing gear valued at hundreds of dollars, with which James Davidson continued the business, and of which he alone received the benefit. Besides this, the \$822.90, Ferguson did not charge to Mrs. Davidson, but to James, or his estate; and in Ferguson's own books it, with the subsequent dealings which took place between the two down to the time when the second mortgage was given, are carried along as one account, and they finally ended in the balance of \$1,250.97 for which that security was taken. And we have in this second mortgage, a specific declaration by both James Davidson and his mother, who is a party to it, as follows: "Witnesseth that in consideration of the sum of \$1,250.97 of lawful money of Canada by the said Wm. Ferguson to the said James Davidson in hand well and truly paid, &c." It is therefore clear that not only was the total indebtedness of James Davidson to Ferguson included in the amount secured by the last mortgage, but that the debt was the debt of James and not that of his mother. It is clear from Ferguson's own evidence that the arrangement, such as it was, between him and Mrs. Davidson, was that the advance was not to exceed \$1,000, and it was for the money

advanced as necessary to pay the compromise, that the mortgage was to be given. His evidence on that point is as follows:

"Q. You were to have a mortgage from her to secure your cash you might advance to settle with James' creditors? A. For a thousand dollars.

"Q. It was for cash you were to advance—you were to get a mortgage for whatever you were to advance, not to exceed \$1,000? A. Yes."

He also says expressly that it was not the agreement, that the mortgage was to include the old debt.

The evidence is equally clear that if the first mortgage had only been for the money advanced by Ferguson as he had agreed, the whole amount would have been paid off. Ferguson's own books show this, and he himself admitted that it was so. His evidence on this point is as follows:

"Q. However you are satisfied now, are you not, that \$222.05 is the balance that appears due on the first mortgage? A. Yes, that would be it.

"Q. And if you deduct from the mortgage the old debt of \$250, and your inspection fees of \$20, and some other items you have charged in there, that mortgage will be wiped out absolutely? That is the first mortgage. Ar'n't you satisfied of that? That would be correct, wouldn't it? A. Yes."

Ferguson was there speaking from his own books. James Davidson positively proved the correctness of the account, and there is no other evidence on the subject. It is therefore clear that Ferguson has actually been paid all, that according to the undisputed evidence he could have ever recovered on this first mortgage, and all that it was really intended to secure. This is altogether apart from the illegality which would have attached to the mortgage, if it had in fact been given to secure the payment in full of Ferguson's debt, in pursuance of the secret agreement, made in fraud of the other creditors of James Davidson. Mrs. Davidson's part in this, as well as the subsequent transactions, was little more than the mechanical act of signing her name, as directed or requested by James. He had apparently acquired complete control over her—what she had in the way of money or property she seemed ready to give him. Though not so debilitated at this time as she was when she gave the second mortgage, she was feeble and old and weak in her mind. The mortgage was prepared by James. It was not read over to the old lady—

it was not explained to her. She had no independent advice. She does not seem to have been consulted as to what was done or what was agreed to be done—how the amount of the mortgage was arrived at, or as to its terms, or as to what became of James' property. Beyond the fact that she was willing to assist her son as he suggested to her, she does not seem to have known anything more about the transaction than an entire stranger to it. She received no benefit from it—James and Ferguson shared that between them. Nor can there, I think, be any doubt from all the evidence, that Ferguson knew perfectly well in what relation James stood to his mother, as to this or similar transactions. In such a case this Court will interfere, and set aside the security as illegal, upon such terms as may be equitable, and there must be a decree to that effect as to this mortgage.

The facts in reference to the sale to Philip Arsenault are as follows: The conveyance was made December 28th, 1899, and at that time James Davidson still owed Arsenault \$280 of the old debt upon which he had claimed when James assigned. He also owed Ferguson a large sum. Arsenault was anxious to purchase this lot, and had spoken to James several times about it. They finally agreed on a sale upon these terms. The price was to be \$600, and it was to be paid in this way—\$200 was to go on account of James' debt of \$280, and the remaining \$400 was to be paid by 3 notes made by Arsenault in favour of Wm. Ferguson as follows: One for \$133.33 payable in a year; one for the same amount payable in two years, and a third for \$133.34 payable in three years; all of them bearing interest at the rate of 7 per cent. These notes were to be given to Ferguson, who was to credit James Davidson with the amount. James Davidson wrote the conveyance as he had previously written the mortgage. It was executed before Savoir, the Justice who had taken Mrs. Davidson's acknowledgment to the first mortgage. It was delivered to Arsenault, the notes were written by James, signed by Arsenault, and handed over to Ferguson, who credited the \$400 to him on account, and Arsenault credited James with the \$200 on account of the old debt. Arsenault registered his conveyance and went into possession. It is contended that the sale should be set aside, or, failing that, that Arsenault and Ferguson should account to the plaintiff for the purchase money, for nothing had been paid on the notes. It is not contended that Arsenault stood in any

fiduciary relation to Mrs. Davidson, and so far as the evidence goes, he had no direct communication with her on the subject of the purchase. So far as she was consulted in reference to it, or acted in reference to it, it was through James Davidson, and him alone. Arsenault knew that she had already given a mortgage on the same property for more than its value to Ferguson. That was spoken of at the outset of the negotiations between them. The only evidence there is on this point is that of James Davidson himself. It is as follows:

"Q. Did you or not have any conversation or negotiations with her about the Arsenault lot? A. About buying the piece of property? Yes.

"Q. Just tell us what took place. A. Well Philip Arsenault on several occasions asked me about buying that piece of property on the opposite side of the road from his home—well, of course, I told him that Wm. Ferguson had already a mortgage for that.

"Q. From your mother? A. From my mother. Oh! well, says Philip, we can easily arrange that with the old man, alluding to Wm. Ferguson, I suppose. Says he, that mortgage is not put on record. Well, it was found after that a little time maybe, and he was asking me again, and I said, well, I will tell you Mr. Arsenault what I will do. I will go down and see Mr. Ferguson, and if Mr. Ferguson is willing or agrees that I should sell you this piece of ground, it will be all right, on condition that he will take you for the amount of \$400.

"Q. What was he offering you for the property? A. \$600."

The witness then explained that at that time he owed Arsenault something over \$200 including the old debt, and his examination then proceeds:—

"Q. Getting back to where we were. In your negotiations with him about the sale of the land, you say he offered you \$600. How did he propose to pay that for this land of your mother's? A. He proposed I would leave to my credit on his account \$200, and that he would give me notes in three years, payable one, two and three, in favour of Wm. Ferguson for the \$100.

"Q. Well then you said you wouldn't do anything until you went and saw Mr. Ferguson? A. I told him Wm. Ferguson had a mortgage on the property, and he said the mortgage was not on record, and the old man (he named him this time) would fix that all right.

"Q. What did you say to that? A. I said I would go and see Mr. Ferguson myself, and I didn't know whether Mr. Ferguson would accept these notes till I would see Mr. Ferguson.

"Q. You went and saw him before anything was done? A. Saw him shortly.

"Q. What did you say to Wm. Ferguson? A. I went in and mentioned the matter to Mr. Ferguson.

"Q. Tell us what you told him, as near as you can? A. I told him I came to see him about a piece of property that Philip was very anxious to get, and I was aware he had a mortgage of the same piece, and Mr. Ferguson told me the mortgage was not on record, that I could please myself.

"Q. What did he say about the notes? A. He said this, of course he would accept the notes but he didn't know exactly what time he would be paid, as Philip owed him then a considerable amount.

"Q. Did he agree to credit you with them? A. Yes."

The witness then says that he himself wrote the deed and got it signed, and his examination proceeds:—

"Q. You wrote out the deed yourself, and what did you do about getting it executed? A. I went and spoke to my mother first about it, and she said it was all right. I didn't explain anything about the first mortgage on the same property or not, and I don't remember she asked me about anything particular.

"Q. Did you explain to her? A. That I was going to get a deed of what we call the Arsenault property; that is the way we had of distinguishing it by the name, and she said it was all right. So I sent up for the magistrate Justinian Savoir and he came down.

Later on in his examination the witness was asked as follows:—

"Q. Did you say you explained anything to your mother about the notes, about how this was to be paid for, or anything of that sort, or what did you tell her about that?

"Q. (By the Court.) Did she know how much you were to get for the land? A. Yes. I mentioned that to her.

"Q. Did you tell her how you were to get the money, in the shape of notes, and what was to be done with it? A. Yes, I think I told her.

"Q. Told her that before the deed was executed? A. Yes."

This evidence is uncontradicted except in one particular. Ferguson swears that he knew nothing whatever about the transaction until Davidson actually brought him the notes. I do not know that it is important, so far as this case is concerned, which version is correct. In either case, Ferguson knew when he took the notes that they had been given in payment of this old lady's property, and that she was not deriving a particle of benefit from the sale. He also knew her mental and physical condition was such as to make her an easy prey to any one disposed to impose upon her, and he also knew how entirely and unreservedly she yielded to the wishes of James Davidson, and how for his benefit her property had been and was being dissipated, as a result of James' control over his mother. And he knew that notwithstanding his advice to her, to save her property for her support, she was squandering it all at James' instance, and that he was himself gathering in the fragments in satisfaction of James' debt to him. Apart from this, it seems an almost necessary inference from the evidence, that Ferguson's memory has failed him in this as in other particulars; for it seems unreasonable to suppose that James Davidson and Arsenault would go to the trouble of having the notes given and the conveyance drawn and executed, without saying a word to Ferguson, when a part of the arrangement was that the notes were to be made payable to him, and accepted in satisfaction pro tanto of James' debt, and also that he should waive his lien on the property created by the first mortgage, when his refusal to accede to either of these terms would have defeated the whole arrangement.

Where a gift is made to a parent by a child not entirely emancipated from parental control, the law, on grounds of public utility, assumes as incident to the relation between the parties and arising out of it, that the gift is the result of undue influence, where the child has had no independent advice. The converse of this proposition is however not true. There is nothing illegal or suspicious or unnatural in a gift from a parent to a child. In *Beanland v. Bradley*, 2 Sm. & G. 339, the Vice-Chancellor says: "It is said that the lessor, being the grandfather of one of the lessees and father-in-law of the other, there existed such a confidential relation between him and those he intended to benefit, as to throw upon them the onus of proving the absence of undue influence. It is a new doctrine, that a parent cannot

by a deed, only a few days before his death, benefit a child or grandchild. . . . There is, however, no rule of this Court which prohibits a man by a voluntary deed from bestowing a benefit upon his son or his grandson or son-in-law, even although only a few days before his death. To provide for his children or grandchildren is, or may be, a necessary duty; and where a father discharges that duty, this Court will not presume a fraud. If, therefore, fraud is alleged, it must be proved in the ordinary way."

The evidence shews that when James Davidson married in October, 1887, he went to live in the Arsenault house, and that he remained there until 1890. He then went to live at the homestead with his mother and continued there until 1897, when he moved to his new house, which is only a few yards distant. His mother lived with him two or three months during the winter of 1898; she returned to her own house in the spring of 1899, and remained the summer. She went back to James in the fall of 1899, before Xmas, and remained until she went to the hospital in October, 1904. So that for many years previous to her death, James was constantly with his mother—in fact they practically lived together. That he had acquired and actually possessed great influence over her cannot be denied. He swears to it, his wife proves it, the transactions themselves shew it, Ferguson knew it, and no one, as it seems to me, can read the evidence in the light of all the surrounding circumstances without being impressed with the belief that both Arsenault and Ferguson carried on their dealings with James Davidson, feeling assured that whatever Mrs. Davidson had in the way of property, James could at any time secure for himself for the asking. Between \$2,000 and \$3,000 of the cash had gone in that way, and now that the personal property had been exhausted, an onslaught was being made on the real estate, and all this without a particle of benefit to Mrs. Davidson herself. She was then 76 years old, shewing at that time marked evidence of mental weakness. James was some 54 years of age and a man of business capacity, notwithstanding his intemperate habits. He prepared the first mortgage and the conveyance to Arsenault, and secured their execution. Neither of them was read over to the old lady, and it is not by any means clear that the latter was even explained to her. She certainly did not seem to remember when she executed the deed to Arsenault, that she had only a few months before mortgaged the

same property to Ferguson for more than its value. Nor was she reminded of this fact. James Davidson concealed both transactions from his wife, who never heard of them until, as she says, the trouble came in October, 1904, five years later, when the old lady went penniless to the hospital. Arsenault also concealed the fact of the purchase from his wife, though she seems to have learned of it from some other source. Now have we not here precisely the elements found in cases where this Court has repeatedly interfered? There is the improvident contract, in this case not merely improvident, but absolutely without any advantage to the donor. There is the old age and the enfeebled mind easily imposed upon and dominated: the absence of all advice except that of the man she trusted—the man who was getting the benefit of the transaction and whose duty and self-interest were in direct conflict. There is the absence of any real explanation of the nature and effect of the transaction itself, or the effect of it upon herself, and there is the intention to make the conveyance, brought about by the ascendancy of one mind over another, sufficiently great to compel submission. In *Harvey v. Mount*, 8 Beav. 439, the Master of the Rolls, speaking of this description of influence, says: "Now that species of influence may be used for good or for evil, and as the advice of one so circumstanced is received by the other as a command, submission may be easily effected." In *Cooke v. Lamotte*, 15 Beav. 234, the M. R. says: "It is very difficult to lay down with precision what is meant by the expression—relation in which dominion may be exercised by one person over another. That relation exists in the case of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated that one may obtain considerable influence over the other. The rule of Court, however, is not confined to such cases. Lord Cottenham considered that it extended to every case in which a person obtains, by donation, a benefit from another to the prejudice of that other person, and to his own advantage; and that it is essential, in every such case, if the transaction should be afterwards questioned, that he should prove that the donee voluntarily and deliberately performed the act, knowing its nature and effect. It is not possible to draw the rule tighter, or to make it more stringent, and I believe it extends to every such case. The fact of such a relation existing between the parties is only a

circumstance in the case, which may according to its bearing on the other facts be favourable or unfavourable to the person seeking to sustain the gift; but the existence of such a relation is not necessary to enable this Court to apply the rule before referred to; and that rule may, I believe, be thus expressed—that in every transaction in which a person obtains, by voluntary donation, a benefit from another, it is necessary that he should be able to establish, that the person giving him that benefit did so voluntarily and deliberately, knowing what he was doing; and if this be not done, the transaction cannot stand.”

See also *Sharp v. Leach*, 31 Beav. 491; *Mason v. Seney*, 11 Grant 447; *Donaldson v. Donaldson*, 12 Grant 431; *Anderson v. Elsworth*, 7 Jur. N. S. 1047, 3 Giff. 154.

If this were a question simply between Mrs. Davidson and her son James, the conveyance, in my opinion, should be set aside. It is however more than that. *Huguenin v. Baseley*, 14 Vesey 273, has been cited as an authority for the proposition that if the subject matter of the gift can be traced into the possession of third persons, it will be affected by the fraud or undue influence which attached to the original transaction, and therefore *Arsenault* would stand in no better position than James Davidson would. *Morley v. Loughnan*, (1893) 1 Ch. D. 736, may be referred to as a recent case in which the above rule was applied. The present transaction I think comes within a different class of cases. In *Cobbett v. Brock*, 20 Beav. 524, it appeared that the defendant was considerably indebted to the plaintiffs, and that they were pressing him for payment. He then told them that he was about to be married to a lady of fortune and that she would give the plaintiffs security for their debt. She did so by a mortgage, and in the action for foreclosure of that mortgage it was set up as a defence by the defendant, who had in the meantime married the lady who gave the security, that it had been obtained by misrepresentation and undue influence. The M. R. says: “In cases where a deed is obtained by fraud or undue influence, though it may be avoided as between the parties, yet it cannot be set aside as against a person claiming for valuable consideration under it, and without notice of the fraud. The real question is this: assume that a fraud was committed by the husband, did the plaintiffs know of that fraud.” In the same case the M. R.

says: "I fully adhere to what I expressed in the cases of *Cooke v. Lamotte* and *Hoghton v. Hoghton*, and if this were a case between Brock (the defendant) and his wife, I should require him to prove all the requisites I pointed out in those cases as necessary to give validity to the transaction; but when the security gets into the hands of a purchaser for valuable consideration, the case is very different, unless the person obtaining the benefit of it has been guilty of or privy to the fraud." Again the M. R. says: "I look at the case in the same light as if certain benefits had been voluntarily conveyed to Mr. Brock by Miss Colyer, and he had afterwards sold them to the plaintiffs. The fact of this being one transaction does not affect the question, unless the plaintiffs were privy to a fraud." In the case from which I have just quoted there was nothing to suggest that the creditor was party or privy to any fraud. Notwithstanding that, it was held to be the duty of the creditor (who was aware of the relation between the parties) to the lady, to see that she had proper independent professional advice.

Now what is the position of the several parties to this transaction. Mrs. Davidson's position is easily defined. She has simply given away \$600 worth of property without having derived any benefit whatever in return. What was the position of Arsenault? He was the person who proposed this purchase, and was anxious that it should be carried out. He was the person who proposed the terms of payment, and he was the only person who derived any substantial benefit from the transaction. It is true that on James Davidson's old indebtedness to him of \$280 he credited \$200 of the purchase money. But that was on a debt which he had agreed to compromise for 10 per cent., and which he was now claiming in full, under a secret arrangement made in fraud of creditors, and illegal on that ground. (*Mare v. Sandford*, 1 Giff. 288; *Higgins v. Pitt*, 4 Ex. 312; *In re McHenry*, *McDermott v. Boyd* (1894), 2 Ch. 428). It is also true that he was to give his notes to his father-in-law for \$400 on James Davidson's account, and it is equally true that although eight years have passed since then, he as never paid one cent on account of that liability. As to his actual knowledge of Mrs. Davidson's condition there is no direct evidence, but that he was well acquainted with it is clearly to be inferred from admitted facts. His wife, who is a daughter of Ferguson, knew the

old lady well—they were friends and neighbours. She was in the habit of repeatedly visiting the old lady, and gave evidence herself of her failing memory. When he wished to purchase, Arsenault did not go to Mrs. Davidson but to James, because he knew that he was the person to manage the business. He knew that he was dealing with an infirm old lady, who had only a few months before come to her son's assistance in the matter of the compromise. He knew that he was asking this old lady to give away \$600 worth of property, and he was asking her to do that when she had already given a mortgage on the same property for more than its value, which Arsenault himself knew was not on record. Put in plain language his proposal to James Davidson was this: "If you will procure for me a conveyance from your mother to me of this property, I will credit you with \$200 on this old debt to me, and I will assume \$400 of your debt to Wm. Ferguson by giving him my notes for that amount, which I will arrange for him to accept." To regard this as in any sense an ordinary business transaction of bargain and sale, is to my mind impossible. It could only be accomplished by a direct fraud perpetrated on this old lady by reason of her absolute incompetency to make such a contract, or else by means of some pressure or undue influence brought to bear upon her by her son. That Arsenault knew this I have not a shadow of doubt. He may not have appreciated the risk he was running in taking a conveyance under such circumstances, any more than he appreciated the unrighteousness of such a transaction, even though he was not an active party in carrying it out, but that he was quite willing that the conveyance should be secured by such means for his benefit, and that he knew that, in the absence of any independent advice, it could not be secured by any other means, I have not a shadow of doubt. James Davidson on his examination was asked as follows:—

"Q. About Mr. Arsenault, when you were negotiating with him to get this deed to him was anything said then about your being able to persuade your mother to sign the deed? A. Well, yes, he just mentioned. I don't suppose there would be any trouble about getting your mother to sign it, and I said, No, I don't think there would be the least trouble.

"Q. Did he say you would convince your mother to sign the deed or sign anything? A. Well, yes, I think he did say that."

It is clear that Arsenault with this knowledge and with these expectations as to James Davidson's influence and control over his mother, left everything to James, and must take the consequences of such pressure or undue influence he may have used in order to obtain the conveyance, or of such omissions as he may have made in affording his mother such explanations as to the nature and effect of the transactions, as she was entitled to have. See *Turnbull & Co. v. Duval* (1902), A. C. 429, at p. 434; *Bischoff's Trustee v. Frank*, 89 L. T. 188.

As to Ferguson, it is true that he had no part in the negotiations, and according to his own account, knew nothing of the conveyance until the three notes were brought to him, but he still retains the notes and claims the amount of them. When he took them he acquired a full knowledge of the transaction, and no one knew, as I have already pointed out, better than he did, how altogether unlikely it was that such a transaction could have possibly been carried out, except by resort to some of the methods I have already suggested. His refusal to take the notes would have defeated the whole arrangement. So far from doing that he adopted it, so far as it could benefit him or his son-in-law; they divided the so-called purchase money between them, and in my opinion, are alike affected by what James Davidson did or omitted to do, and they must both take the consequences: *Kempson v. Ashbee*, 10 Ch. Ap. 15; *Dawson v. Dawson*, 12 Grant, 278; *Berdoe v. Dawson*, 34 Bea. 603; *Baker v. Bradley*, 7 DeG. M. & G. 597; *Cox v. Adams*, 35 S. C. R. 393.

I have not thought it necessary in discussing these two transactions to make more than a general reference to Mrs. Davidson's mental condition. Three months after the conveyance to Arsenault was made, she executed a will. It is dated March 6th, 1900. There does not seem to have been any question raised as to her competency to make it. In fact her entire property had been dissipated during her life, and there was nothing left to the devisees but this lawsuit. The last mortgage was given on the 22nd December, 1902, three years subsequent to the conveyance to Arsenault, and two years and nine months subsequent to the will. And it is contended that during these years she had become so weak mentally, that when she executed the mortgage she was in fact incapable of understanding the nature or effect of the instrument. It is also contended that

there were such fiduciary or confidential relations existing between Ferguson and Mrs. Davidson, when this mortgage was made, that this Court would set it aside, Mrs. Davidson having had no independent advice. Not only is this contention made, but it is also charged that the mortgage is the result of direct pressure brought to bear by Ferguson upon Mrs. Davidson. There is no doubt that Ferguson had been an intimate friend of the Davidson family all his life. In his younger days he was in their service and employ for a long time, and later on when he was doing business for himself, he dealt with Wm. Davidson and I think continued to do up to the time of his death. He made him executor of his will and after William Davidson's death, Ferguson constantly visited Mrs. Davidson. He drew her last will and several others for her, and in all I understand she named him as executor. It is true that some of her money was in his hands, but it was subject to her order, and was paid out on her order or on that of some person recognized as acting by her authority. I do not find an instance where she consulted him as to her affairs, or where she sought his advice as to their management. I do not see that there was any relation existing between these parties which of itself created any legal duty from the one to the other, or which created any dominion or control by the one over the other, from which one ought to assume the existence of undue influence or coercion of any kind in the case of a voluntary gift. At most I think it may be said that there was a moral obligation upon one situated as Ferguson was, to make some substantial effort to protect a feeble old lady from squandering her property, impoverishing herself upon a reckless and spendthrift son, doing him no permanent good and herself a permanent injury, especially where he was himself deriving a benefit out of the transactions. And it may be added that in reference to this second mortgage that it disposed of the last vestige of the property which the old lady had, and which Ferguson knew that by the will she had made, she intended should be left at her death, for the benefit of James Davidson and his invalid wife and family. Apart from this there is I think ample evidence to show that this mortgage should not be permitted to stand. In the first place as to the pressure. I have already pointed out that the \$1,250.97 for which the mortgage was given, was the total indebtedness at that time of James Davidson to Fer-

guson. In his answer Ferguson divided this sum into two—one for \$822.90 as an indebtedness of Mrs. Davidson, and the other of \$428.07 as an indebtedness of James Davidson. In section 17 of his answer Ferguson states as follows: "The said mortgage was made and given for the purpose of securing the indebtedness of the said Helen Davidson for the said sum of \$822.90 to me and also the said indebtedness of \$428.07 from the defendant James Davidson to me, and said two indebtednesses and liabilities of the said Helen Davidson and James Davidson were then existing and due and owing to me from them as aforesaid. I have no knowledge, information or belief as to who suggested or advised the making and executing by the said Helen Davidson of the said mortgage, but I allege and say that I informed the defendant James Davidson and the said Helen Davidson that I would not furnish and supply the said defendant James Davidson with any more goods and supplies from my store, unless I got security on the said house and buildings of the said James Davidson, and on the said lands and premises of the said Helen Davidson, for his then existing indebtedness to me of the said sum of \$428.07—that thereupon, and in order to secure further advances of goods and supplies from me, to and for the said James Davidson, the said Helen Davidson and James Davidson voluntarily and of their own free will and accord, made and executed in my favour the said second mortgage bearing date the 29th day of December, A.D. 1902, as aforesaid."

It is necessary to explain that when Ferguson here speaks of house and buildings belonging to James Davidson, he refers to a house which James built on the homestead lot, to which he removed in 1897, and which Ferguson then supposed belonged to James. Ferguson's evidence is substantially in support of the extract from his answer that I have just given, that is, that James' indebtedness to him at that time was \$428.07, and he then told both James and his mother, not that he would not trust her any further without security, but that he would not give James any more goods without security; and he also stipulated the security which he required, that is, a mortgage both on what he supposed was James' house, and on what he knew was the last remnant of everything in the way of property which the old lady then owned. In view of all the circumstances and the position in which James Davidson then was, this demand

for security could not have been made except with a view of coercing the old lady again to come to the rescue, and a pressure upon James to use his control over her to force her to do so. It was precisely the kind of pressure likely to be successful, as it proved to be. The mortgage was prepared by Ferguson's solicitor under his instructions, and without consultation with Mrs. Davidson as to its terms or conditions. Instead of being given in order to get further advances, as the section of Ferguson's answer which I have quoted would lead you to suppose, there was in fact no agreement to make any further advances, and there were in fact no further advances ever made. Instead of being a mortgage to secure James' indebtedness of \$428.07, as the answer implies it was to be, it is a mortgage to secure the whole \$1,250.97. The effect of the transaction was to impoverish this old lady and enrich Ferguson by \$1,259.97. Ferguson gave the mortgage to Doucette, his clerk, and son-in-law, with instructions to take it to Raymond, who is a notary public and also a son-in-law of Ferguson, to go to Mrs. Davidson and get it executed. When it was executed there were present Mrs. Davidson, James Davidson, Raymond and Doucette. It was not read over to Mrs. Davidson, but Raymond after reading it over himself says that he explained it to her; he told her that it was a mortgage on the homestead for \$1,200, told her the terms and conditions, all of which she said she understood and which he says she seemed to him to understand. This took place in the forenoon, and when Mr. Raymond went home an interview took place between him and his wife which led him to return to Mrs. Davidson in the afternoon alone. Mr. Raymond's evidence on this point is as follows:—

"Q. When you went home didn't your wife tell you when you told her where you had been and what you had done, that it was a shame to go and have a mortgage from that old lady, and that everyone said she was crazy? A. She may have said words to that effect, but not that.

"Q. But in consequence of what she said and what took place between you, you came back? A. Yes.

"Q. And went up again to see the old lady? A. Yes; alone this time.

"Q. What took place then? A. I went up stairs and asked if Mrs. Davidson was upstairs. Mrs. Davidson was alone. She said, 'Go up, or something like that, and I said to her, 'Pardon me, I would like to ask you a question,'

and I said, 'Do you remember signing a certain document before me today?' and she said, 'Yes,' and I said, 'Would you mind telling me just what the document was?' and she said then in her own words, told me what it was.

"Q. Didn't she tell you she signed a paper to help James? A. She told me the paper was a mortgage. She said, 'I remember signing a mortgage on the place to Mr. Ferguson for \$1,200 to help James to pay his debts.' That is the recollection I have of it, or to get him out of his trouble."

James Davidson's evidence on this point—what he says in reply to a question as to what took place about the second mortgage:—

"A. Well Mr. Ferguson said he wished to get a mortgage on the whole place for the whole amount.

"Q. A mortgage for this \$1,250? A. Yes.

"Q. A mortgage from whom? A. Well, my mother, and I would have to sign it too, that the property was still (willed?) practically all to me, that is the way I understood it.

"Q. By whom? A. By my mother.

"Q. Did he say anything about your creditors? A. Oh, there was a party in Quebec had a judgment against me. He mentioned that to me, and as soon as I would fall into the property that they would likely come down on me, and by getting the mortgage he would be secure, and it would protect me at the same time.

"Q. Did he want you to see your mother, or what did he say about it? A. I spoke to mother about it, and I don't know whether Mr. Ferguson said 'yes' or 'no' to her about it.

"Q. You never heard that he spoke to her? A. No, for it didn't make much difference at that time, she wasn't in a state to transact any business at that time."

Mrs. Davidson's mental condition at this time may afford a satisfactory explanation why in this last transaction she seems to have been consulted or considered even less than in reference to the other two, and why she could be ignored beyond getting her signature as she was requested by her son. The evidence on this point is too voluminous to quote at length. I shall give but a brief summary of it as relating to the period from 1898 to 1902. Commencing with 1898 it appears that the old lady was becoming childish and forgetful—she would cry to be taken

home when she was actually at home. She often imagined the boys were on the roof of the house tearing down the chimneys, and wanted some of the family to go down and stop them. They often took her to the house to convince her there were no boys there, but she imagined they had run away, and when she returned she would complain of the same thing over again. She had visited the lazaretto, and when she returned she said the Sisters there had very little to do, as they were tearing down the chimneys every day and putting them up again. She continued speaking of this, and wondered why her husband (who had been dead some years) did not come back. She complained of a "hissing" in her head, and consulted Father Morrissey, who had some reputation in that locality as an expert in the treatment of such trouble. He gave her a liquid with which to syringe her nose and ears, and a salve to be applied to the ear. When any attempt was made to use the syringe, she laughed and behaved in such a childish way that they could not use it at all. She used the ear salve for rheumatism in her knee. She used the potatoes and turnips prepared for the table as a poultice, which she also applied to her knee. At another time she painted it with boot polish. In 1899, though at times apparently rational, she became more helpless and more childish, and required greater care and more constant attendance. She would still cry to go home when in fact she was at home—constantly insisted that the weather was foggy when it was fine, and was constantly speaking of the tides. To use Mrs. James Davidson's words: "She never went out doors but it was high tide or she was wondering if it was high tide for her husband to come home." Her weakness and childishness continued to increase in 1900 and afterwards. She would wash the table dishes with milk and the table with yeast. On one occasion—one Sunday in 1900—she came down stairs in her nightdress with her crepe bonnet on, filled the kettle with paraffine oil, and put it on the stove. She constantly removed the pillow-shams and counterpanes soon after the beds had been made up in the morning, put them away in drawers and turned down the bed-clothes, imagining it was night and time to go to bed. She often talked and sang to herself, and spoke of her husband as though he were still living. She would eat the food prepared for the hens, and shut them all up in the day time. She would cut up soap to be eaten as food. For a long time she did

not recognize her own grand-daughter, an inmate of her own family, calling her "Mary" apparently under the impression she was a servant in the house, of that name. At one time she asserted she had been married again; in the summer of 1902 she continually cried for her mother—so violently on one occasion that they were obliged to put her in a chair and haul her from room to room in order to quiet and soothe her. From having been cleanly in her habits and particularly as to her dress and personal appearance, she became quite the reverse. In fact her mind became so weak, and her physical functions so impaired, that she lost all control over herself, and had to be washed and cared for as a child, sometimes two or three times during the day. This was in 1900 and 1901. This seemed to annoy her, and she would often shew her body to strangers so that they could see that she was clean and there was nothing wrong with her. Though naturally modest she at this time exhibited her rheumatic knee to strangers, regardless of sex, apparently under the impression that each was a doctor or could benefit her in some way.

I have extracted the above facts from the evidence of Mrs. James Davidson and her daughter, and there is nothing to suggest that it is an exaggerated account. In many of its details it is corroborated by the independent testimony of Brideau Sonier and McGraw. Mrs. Hill, another witness, states that she occupied the old lady's house as tenant in 1901 and 1902. She paid her the rent in 1901, but she would often come back for it again. She would go into the house, close all the doors and speak of her husband as if he were alive. In 1902 she was worse. Mrs. Hill that year paid the rent to Mrs. James Davidson. In addition to other unusual things the old lady did that year, she came to Mrs. Hill's house one day dressed in most ragged clothing, when she had plenty of good clothing at home; and sometimes she would come with two or three caps on her head and a dish towel tied around them. This evidence clearly shows that in the years 1901, 1902, and later, this old lady was not only under insane delusions, but that her mind and memory had become so entirely weakened and impaired that no business transaction with her, much less a voluntary gift, regardless altogether of any question of undue influence, would be permitted to stand, without the clearest proof of her understanding its nature and object and its effect upon herself, and without having

the protection afforded by a competent and independent adviser.

In *Hoghton v. Hoghton*, 15 Beav. 278, at p. 298, the M. R. says:—"I am of opinion, as I lately held in a case of *Cook v. Lamotte* (15 Beav. 234), that whenever one person obtains by voluntary donation a large pecuniary benefit from another, the burthen of proving that the transaction is righteous, to use the expression of Lord Eldon in *Gibson v. Jeyes*, 6 Ves. 266, falls on the person taking the benefit. But this proof is given, if it be shewn that the donor knew and understood what it was that he was doing. If, however, besides the obtaining the benefit of this voluntary gift from the donor, the donor and donee were so situated towards each other that undue influence might have been exercised by the donee over the donor, then a new consideration is added and the question is not, to use the words of Lord Eldon in *Huguenin v. Baseley*, 14 Ves. 300—whether the donor knew what he was doing, but how the intention was produced—and though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside. In many cases the Court from the relations existing between the parties to the transaction, infers the probability of such undue influence having been exerted. There are the cases of guardian and ward, solicitor and client, spiritual instructor and pupil, medical man and patient and the like, and in such cases the Court watches the whole transaction with great jealousy; not merely for the purpose of ascertaining that the person likely to be so influenced, fully understood the act he was performing, but also for the purpose of ascertaining, that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit. Not that the influence itself flowing from such relations is either blamed or discountenanced by the Court; on the contrary the due exercise of it is considered useful and advantageous to society; but this Court holds as an inseparable condition that this influence should be exerted for the benefit of the person subject to it, and not for the advantage of the person possessing it."

In *Huguenin v. Baseley*, 14 Ves. 273, at p. 299, Lord Eldon says:—"Take it that she intended to give it to him it is by no means out of the reach of the principle. The question is not, whether she knew what she was doing,

had done or proposed to do, but how the intention was produced, whether all that care and providence was placed around her, as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf. Her situation, with reference to pecuniary circumstances during the whole period, must also be attended to, her husband a few weeks before having been relieved from distress by a sum of money advanced by Baseley."

I think this last transaction must be set aside also.

There is one other matter in reference to which relief is sought. In William Ferguson's account as executor of the William Davidson estate, he has charged under date of January 9th, 1899, the amount of two promissory notes, one for \$255.83 and the other for \$153.50, as having been paid by him out of estate funds. We have only Mr. Ferguson's account of the transaction, and according to it this money was used in paying these two notes, which were made by Ferguson for the accommodation of James Davidson at the request of Mrs. Davidson. It seems that the old lady wished to assist James who was wanting money, and she wanted Ferguson to help him. He suggested giving him his own notes which James could get discounted. This was done and at maturity Ferguson was obliged to pay them. There is nothing to show that James had anything to do with the arrangement or used any influence with his mother in reference to the matter. It is a simple case of legal liability on the part of Mrs. Davidson, at whose request the notes were given, and I think she would be liable. In *Brittain v. Lloyd*, 14 M. & W. 762, Pollock, C.B., says:—"If one ask another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume that character which ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay as he would be in a direct request to pay money for him with a promise to repay it." It may be that strictly speaking the charge should not be in Ferguson's account as executor, inasmuch as it was a liability incurred at the instance of Mrs. Davidson, with which her husband's estate had nothing to do. But that would only make him have so much more money in his hands belonging

to Mrs. Davidson under her husband's will, which she would owe him. While I express my opinion that the plaintiffs have no claim as to this money, I think the matter is one for the Probate Court, as the plaintiffs have not asked for a decree for the administration of the Davidson estate.

I think there must be a decree setting aside the first mortgage and a declaration that all the money which Ferguson intended should be secured by it has been paid. The conveyance to Arsenault must also be set aside except as to that part of the lot sold and conveyed by him to Loggie, and there will be a reference as to the value of that lot, the value of present improvements, &c. The second mortgage will also be set aside, and the defendant Ferguson will be ordered to deliver up to the executors of Arsenault the three promissory notes on request, to be cancelled.

Reserve the question of costs until the Referee's report.

PRINCE EDWARD ISLAND.

SUPREME COURT.

MAY 12TH, 1908.

IN RE THE WINDING UP ACT AND SUMMERSIDE ELECTRIC CO., LTD.

Winding up Proceedings—Validity of Debentures—Lien on Land—Necessity for Compliance with Requirements of Statute of Incorporation — Two-thirds Vote Required — Proxies—Validity of By-law—Bona Fide Purchaser of Debentures—Notice of Informality—Right of Creditors to Dispute Validity of Debentures—Estoppel.

Neil McQuarrie, K.C., A. C. Saunders and J. E. Wyatt,
for debenture-holders and liquidators.

W. E. Bentley and Gilbert Gaudet, for certain creditors.

FITZGERALD, J.:—The assets of this company having been collected and paid into Court and notice given by the liquidator of a proposed payment to creditors of a single and final dividend, certain creditors of the insolvent company obtained leave to examine the books of the company more particularly as to a debenture issued by it.

After this examination they contended that this debenture issue was illegal, and that the claims of the holder to payment in full out of the company's assets as a first charge should not be allowed.

On the seventh day of April, 1908, I issued a summons directed to these bond-holders to appear and make proof of their several demands, and their claim to be paid in full out of the assets of the company, and the creditors opposing and the bond-holders were heard by counsel.

Shortly, the facts appear to be as follows:—

The company was incorporated by special Act of incorporation of the Provincial Legislature in 1896.

Section 16 of that statute reads as follows:—

“The directors may, from time to time, for the purposes of the company, when authorized by a by-law for that purpose, passed and approved of by the votes of the holders of at least two-thirds in value of the stock of the company qualified to vote, present in person, or represented by proxy at a special meeting called for considering such by-law, borrow such sums of money not exceeding the paid up capital of the company, as the shareholders deem necessary, and issue bonds or debentures therefor in sums not less than one hundred dollars at such rate of interest and payable at such times and places as provided in such by-law, which shall be a first charge upon the property of the company.”

And section 7 reads as follows:—

“At all meetings of the shareholders each share shall entitle the holder to one vote, which may be given in person or by proxy, but no one who is not a shareholder shall act or vote as such proxy, and no shareholder shall be entitled either in person or by proxy to vote upon any share or shares in respect of which any call is in arrear and no shareholder shall hold more than two proxies.”

On the first day of February, 1904, as appears by the minute book of the company, a special meeting of the shareholders was held in pursuance of section 16, and at it the directors were authorized by by-law to issue debentures for any sum not more than \$6,000 to pay for certain additional plant put in by the company, such debentures to be for \$500 each, the paid up capital of the company being at the time \$25,000.

Acting on this authority the directors shortly after, viz., on the 15th February, 1904, issued 12 debentures of \$500 each, which debentures were purchased by the several persons

now claiming thereon, all original holders except Mr. J. E. Wyatt, who is an assignee for value of James A. Sharp, one of the original holders.

These several purchasers paid for such debentures their full face value. The amount thus realized was paid into the company and expended in the purchase of such new machinery.

Of the bona fides of the whole transaction I have no doubt.

The minutes of shareholders' meeting of the 1st February disclose the fact that there were only four shareholders present in person, while they held eleven proxies of other shareholders, consequently there was a breach of section 7 of the Act, some one or more of them necessarily holding more than two proxies.

It is contended that this irregularity renders invalid the issue of these debentures—holders of two-thirds in value of the stock, qualified to vote, not having authorized their issue; and that creditors in these winding-up proceedings have a right to oppose their payment in full as a first charge on the assets of the company.

It further appeared that one of the bond-holders, Thomas E. Ramsay, was also a shareholder, and was present at the meeting of the first February, and that the proxies of two others of them, viz., James A. Sharp and Isabella Richards, also shareholders, were used and voted on at that meeting; but that the present holder of Mr. Sharp's bond, Mr. J. E. Wyatt, is a bona fide purchaser without notice of such irregularity.

It further appeared that in all the subsequent general annual statements submitted by the board to their shareholders at their annual meetings this issue of debentures for \$6,000 was set forth and shewn, with the payment of the yearly interest thereon, viz., in the years 1905, 1906, and 1907, in which latter year the company was wound up; this borrowing being, therefore, known and so ratified and adopted by the shareholders of the company.

This case does not, in one phase of it, owing to the number and weight of authorities, present any great difficulty.

As I understand the law to-day, it is well settled that when a company has power to issue such securities, no informality or irregularity in their issue can be set up against a bona fide holder for value, who has a right to presume that

all the preliminaries required to be gone through on the part of the company before that power can be duly exercised, have been observed.

In the words of Lord Justice Selwyn in *Re Land Credit Co. of Ireland*, 4 Ch. App. 468, "he is entitled to presume that the company are acting lawfully in what they do."

This rule applies, of course, only when the act done is within the scope of the powers of the company.

Beginning with the decision of Lord Campbell in 1855 in the *Royal British Bank v. Turquand*, 5 E. & B. 246, down to the case of *Duck v. Tower Galvanizing Company* (1901), 2 K. B. 314, decided by Lord Alverstone, in appeal, no case, unless it be *Darcy v. Tamar Kit Hill*, L. R. 2 Ex. 158, contravenes the law as I have stated it.

I will refer to a few of these cases shewing the nature of the formalities which ought to have been observed and which were not.

In the first case cited the registered deed of settlement required a resolution of the company authorizing the directors to issue the bond claimed. There was no such resolution; yet on appeal *Jarvis C.J.*, says: "The holder was bound to read the statute, but not more, and finding that the authority might be made complete by resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document affirmed to be done."

In *Fountaine v. Carmarthen Ry. Company*, L. R. 5 Eq. 322, debentures were issued without being sanctioned by a general meeting of the shareholders as required by statute. Lord Hatherly, then V.-C. Wood, said: "I find vested in the directors a full, ample and complete power provided only the shareholders have taken the preliminary steps. The directors have affected to bind the company by their acts, but they have omitted a solemnity which ought to have been taken. I think the case falls within the principle expressed in *Royal British Bank v. Turquand*."

In *re Land Credit Company of Ireland*, 4 Ch. App. 461, Lord Justice Selwyn, having before him on appeal in the liquidation of the above company certain bills issued by its chairman, but not having deposited against them the securities required by a resolution of the directorate, said, after referring to *Royal British Bank v. Turquand*:—

"Applying then those principles to the present case, if, when an act within the scope of the powers of the board of

directors is done by them or (which is the same thing), is ratified and adopted by them, a person contracting with the directors is not bound to see that certain preliminaries which ought to have been gone through on the part of the company have been gone through, still less in my judgment are innocent holders of a negotiable security bound to inquire whether those preliminaries have been observed."

In *Mahony v. East Holyford Mining Company*, L. R. 7 H. L. 893, cheques were paid by the appellant bank signed by two persons calling themselves directors of the respondent company and countersigned by a person calling himself the secretary of the company. When the company was ordered to be wound up, it appeared that there never had been a meeting of shareholders nor any appointment of directors or of a secretary.

Lord Hatherly, at page 893, after referring to *Royal British Bank v. Turquand* as settling the law that those who deal with joint stock companies are bound to take notice of its memorandum and articles of association and must be affected with notice of all that is contained in these two documents, says: "After that the company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which by its articles of association it appears to possess, and all that the directors do with reference to what I may call the indoor management of their own concern is a thing known to them and known to them only. . . . Those dealing with the company are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done when those external acts purport to be performed in the mode in which they ought to be performed."

In *Landowners West of England, etc., Inclosure Co. v. Ashford*, 16 Ch. D. 411 (which I will refer to again), where by special section in its Act of incorporation the company were authorized to borrow such sums of money as shall from time to time be authorized by an order of a general meeting of the company, not exceeding one-third of the subscribed capital, no general meeting sanctioned the security issued and claimed on, out of the assets of the company. Fry, at page 438, says: "Then the debenture holders raise several objections to the bank's claim; they say in the first place that the 46th section requires that the amount to be borrowed

shall be specified in an order of the general meeting of the company, and that no such order was given. I think the cases which have been referred to shew that that is a directory portion of the statute and not one which it is obligatory on the lender to shew has been performed as against the company, but that the company borrowing money would be taken to have done all that was necessary to give themselves that power."

In *Re Romford Canal Company*, 24 Ch. Div. 85, a case like the one before me, and in which certain debenture-holders were claiming in winding-up proceedings, the resolution authorizing the borrowing on debentures was invalid because a quorum of shareholders was not present at the meeting. Mr. Justice Fry, at page 92, says:—

"I understand the law at present settled, or perhaps I should rather say, developed thus: where a company has power to issue securities, an irregularity in the issue cannot be set up against even the original holder, if he has a right to presume, *omnia rite acta*."

In the *County of Gloucester Bank v. Rudry Merthyr Colliery Company* (1895), 1 Ch. App. 629, under the power given them by their articles of association, the directors of the company had resolved that three should be a quorum. But only two directors had authorized the affixing of the company's seal to the mortgage to the plaintiffs.

Lord Halsbury said at page 185:—

"I am of opinion that nothing has been urged which would induce us to say that the authority of the company has not been given to the making of the mortgage, at least in this sense, that an outside person who has no other means of knowledge is entitled to regard the authority as sufficient." And after referring to *Mahony v. East Holyford Mining Company*, he goes on to say on page 186: "All the documents which the mortgagees were entitled to see would only shew this, that by some regulation—part of the 'indoor management' of their own concern, as Lord Hatherly called it—the directors were capable of making any quorum they pleased. . . . An outside person knowing that and not knowing the internal regulation itself would in the ordinary course of business assume and would be entitled to assume that the mode adopted was that by which the authority of the company was conveyed."

In *Re Hampshire Land Company* (1896), 2 Ch. 743, the directors of the company were empowered by their articles of association to borrow money exceeding their paid up capital,

provided such borrowing had been previously authorized by a general meeting of the shareholders, called by notice specifying the nature of any special business. The notice convening this meeting contained no reference to the intended borrowing. Vaughan Williams, J., at p. 747, says:—"It must be taken that as a fact a resolution was passed by the shareholders of the company authorizing the borrowing, and it must be also taken that no notice was given to them that this special business was intended to be proposed to the meeting which passed the resolution, and that therefore the authority of the directors of the company to borrow this money was not perfected. They had no authority in the absence of a properly passed resolution to borrow this money. "It is not disputed that the authority of the Royal British Bank v. Turquand is such that the surety had a right to assume in a case like this that all these essentials of internal management had been carried out by the borrowing company."

In *Duck v. Tower Galvanizing Company* (1901), 2 K. B. 314 the Articles of Association gave the company power to borrow money on debentures. The company held no meeting, statutory or otherwise, and there were no resolutions or minute books, nor were any directors ever appointed. One person carried on the business of the company without reference to the other signatories to the articles. A debenture was issued by this person signed by himself and his wife as directors of the company.

Lord Alverstone at page 318 says:—"The memorandum of association allowed the company to borrow money on debentures and the articles of association of the company might very well have justified the issuing of such a debenture as this; and the objections which the County Court Judge has held to be fatal are merely objections as to formalities which ought to have been observed."

I would refer also to the Canadian cases following and adopting the law as decided in these cases: *McDougall v. Lindsay Paper Mill Company*, 10 Ont. P. R. 247; *Merchants Bank of Canada v. Hancock*, 6 Ont. App. p. 288, and *Bonanza M. M. Company ats. Sheppard* (1894), 25 O. R. 305.

The logical result of such decisions is apparent. Given the power, it matters little how it is exercised. An outside bona fide holder for value has a right to assume as regards the internal management of the affairs of the company that that which ought to have been done has been done. He is bound to see, at his peril, that the power

exists, or has not been exceeded, whether it be given under the Articles of Association framed under the Joint Stock Companies Act, or by special legislative enactment. He need, however, make no inquiries as to its due exercise.

It may be that the meeting of shareholders required before the issue of authorized securities has never been held or has been irregularly called, or that the directors issuing them have never been appointed, or that the regulations of the company call for the signatures of three directors, and only two sign, or indeed, as in the case last cited, that an individual member of a company has without calling together its shareholders or consulting them, usurped authority to act for it.

Under such authorities I need not, I think, stay to inquire whether in this case the unquestioned authority to issue debentures for an amount well within the company's powers has been duly exercised; for all outside holders of the debentures issued under this 16th section of the company's charter cannot be affected by any informality or irregularity in any meetings required under such charter, without notice of such informality.

They can presume that the meeting of the first of February was duly called and that the necessary by-law was approved of by holders of two-thirds in value of its stock duly qualified to vote—all such matters being known only to the company itself and being part of its internal management, not in any way under the control of the debenture holders, and which they were not bound to inquire into.

I should like to say here, however, that it appears to me that it might well be held that no real informality is shewn by the company's minutes.

There were present at this meeting in person and by proxy stock to the value of \$18,500, and if you refuse voting power to three of the proxies (representing severally three, five and seven shares, thus leaving only two proxies to each shareholder present), there will still be left stock duly qualified to vote to the amount of \$17,000—more than two-thirds in value of the company's stock. Bona fide voting power was present in excess of the two-thirds required by the statute. It is not a grave irregularity that possibly some shareholder held more proxies than the law allowed, if discarding these the value required actually authorized this debenture issue.

I do not refer particularly to the case of *Darcy v. Tamar Kit Hill* before mentioned, for Lord Hatherly in *Mahony*

v. East Holyford Mining Company, treats it as having no bearing upon the principles enunciated by him in that case, and as a case in which the secretary had forged the names of the directors; Lord Justice Lindley, in the County of Gloucester Bank v. Rudry Merthyr & Company, as a case on the construction of two Acts of Parliament not affecting his decision in the case before him; and Lord Alverstone as a single exception in a long line of cases upholding the dicta that no informality can destroy the rights of a bona fide debenture holder.

Nor have I referred to many cases cited by the counsel for the creditors for either fraud or the fact that the directors went beyond their powers, or that the words of the Act considered were negative and prohibitory, distinguish them from the cases I have cited.

I am dealing with an empowering clause giving permission to borrow on certain conditions, not with a fraudulent, or excessive use of authority.

There remains, however, the case of two of these bondholders who are affected with notice of this irregularity, one present in person at the meeting of the first February, the other by proxy.

Can the creditors of the company in this winding up oppose their payment in full? I do not think they can.

In *Fountaine v. Carmarthen Ry. Co.*, Lord Hatherly considered the clause in the Act of Parliament, providing that the company should not exercise their powers to borrow without the authority of a general meeting, directory only, and that creditors were not intended to be protected by it. He said: "I think the intention of Parliament was not to protect creditors, but to protect the company against any undue acts on the part of the directors, and I have no doubt that the company on having heard that the directors were about to do such an act without authority, might have filed a bill to restrain them."

In *Landholders West of England, &c., Inclosure Co. v. Ashford* (sup.), a case in which contesting creditors were seeking to invalidate each other's claims, Fry, Justice, said, immediately after the quotation I before made from his judgment: "Then is it a provision which the creditors of the company can insist upon? The case I was referring to before Lord Hatherly, *Fountaine v. Carmarthen Ry. Co.*, does show that this provision with regard to the general meeting is inserted in the Act of Parliament for the benefit of the shareholders and not of the creditors. They could not stop

the company exercising that power, and therefore it does not interest them."

In *McDougall v. Lindsay Paper Mill Company*, (sup.) Chancellor Boyd, at p. 253, expressed his doubts as to the locus standi of creditors to attack a mortgage issued without the two-thirds vote of the shareholders required by the statute, and in *Merchants Bank of Canada v. Hancock* (sup.) refused to allow an outsider as a creditor to attack an hypothecation to the plaintiff bank where no by-law was passed and approved by a two-thirds vote of shareholders, as required by statute, and in *Greenshields v. Paris*, 21 Grant, at page 235, Vice-Chancellor Blake refused to allow subsequent encumbrancers to raise the question as to the validity of a mortgage invalid by reason of its having been given to a director of the company interested.

In the case before me the company are unquestionably estopped in this liquidation of the assets from disputing the legality of these debentures; as the borrowing was set forth in three annual reports of its directors to them, it must have been well known to them, and not being objected to must be considered as ratified and adopted by them.

If these provisions regulating the issue of these debentures are for the protection of shareholders alone, and shareholders ratify and adopt their irregular issue, I can see no reason for permitting outside creditors to raise the question as to their validity; they cannot be in a better position than the principals, who with full power have waived any irregularity, and following the cases I have cited I must hold that they have no right to do so.

In the case of *Mr. Wyatt* a bona fide transferee for value from an original holder affected with notice, if the creditors could not raise the question of the validity of the issue of the debentures assigned to him while in the hands of the original holder, much less can they raise it now against a bona fide transferee for value without notice: *Webb v. Commissioner of Hern Bay*, L. R. 5 Q. B. 642; *In re Romford Canal Co.*, before cited, and in *re Land Credit Company of Ireland* (supra).

It was argued that *Mr. Wyatt* must hold this bond subject to the equities (supposing there were any) which existed between the company and the person to whom they were issued originally; and that a debenture payable to bearer does not pass to the holder the full rights expressed on its face. There is nothing in either of these contentions. Debentures in this form pass as freely as bank

notes. The company contract to pay not any particular person, but any one who may be the bearer, and provided always there was authority for their issue, holders for value without notice of the equities are entitled to prove in this, or any liquidation, for the amount due free from equities.

In re Imperial Land Co. of Marseilles, L. R. 11 Eq. 478, and see Union Investment Co. v. Wells, 39 S. C. R. at page 638.

None of the other points raised require, I think, from me particular consideration.

Nothing was said on the argument as to the interest due on these debentures, but under the authority of Warrant Finance Company's Case, L. R. 4 Ch. 643, and in Re Imperial Land Co. of Marseilles above quoted, the rule appears to be settled that in a compulsory winding up, such as this is, interest can only be proved up to the commencement of the winding up.

For these reasons I hold that the debenture issue of this company for \$6,000 is good and valid, and that the several holders of them are entitled to rank for payment in full thereof, with interest actually and severally due thereon at the commencement of the winding up of this company, viz.: on the 10th day of August, 1907, and order that the dividend sheet be prepared accordingly.

No costs of this contest will be allowed out of the assets of the company in this winding up. The parties opposing and upholding the debentures will each bear their own costs.

PRINCE EDWARD ISLAND.

EASTER TERM.

MAY 29TH, 1908.

SUPREME COURT.

WINDSOR v. SIMMONS AND OTHERS.

New Trial—Sale of Goods—Undisclosed Principal—Implied Warranty of Quality of Goods—Verdict Contrary to Evidence.

Neil McQuarrie, K.C., for plaintiff.

J. J. Johnston, and A. C. Saunders, for defendants.

SULLIVAN, C.J.:—In the course of his argument in shewing cause against the rule nisi in this case, the defend-

ant's counsel made three contentions: First, that this action cannot be maintained in the name of the plaintiff; secondly, that there was not sufficient evidence of the identification of the goods returned and alleged to be of bad quality to justify the jury in finding a verdict for the plaintiff; and thirdly, that in this case there was no implied warranty as to the quality of the goods; all of which contentions, it appears to me, fail, in view of the evidence adduced at the trial.

According to the evidence of Elisha Wright, he acted as agent for the plaintiff in making the contract and the defendants were made aware that he was so acting.

According to the contention of the defendants' counsel the plaintiff was, when the contract was made, a disclosed principal, but according to the evidence of the defendants the plaintiff was undisclosed to them, and they made the contract with Wright, knowing nothing of the plaintiff. At page 167 of the evidence, Simmons, who was the acting party for the defendants, is reported as having said:—

“Never heard of Windsor, never knew such a man was in existence until some months afterwards.” And at page 168 he is reported to have said: “It is a thing impossible for me to know anything about Mr. Windsor, because his name never had been spoken to me by anybody.” Under the law on the evidence in either of these views it is competent to maintain the action in the plaintiff's name, either as the party with whom the contract was made by his agent, or as an undisclosed principal.

As to the identity of the goods, the evidence not only greatly preponderates in the plaintiff's favour, but so far as regards at least a part of them, it is overwhelmingly against the defendants. Regarding the implied warranty, that the goods should be reasonably fit for use, or should be merchantable, and, being articles of food, that they should be reasonably fit for the purpose for which they were supplied—which is the question that goes to the merits of the case—the rule is that in order to get rid of such a warranty there must be between the vendor and the purchaser a clear, a distinct contract resulting in that effect.

The evidence in this case does not indicate such a contract. On the whole case I am clearly of opinion that the verdict is an improper one, and that there should be a new trial. The rule will therefore be made absolute. The question of costs is reserved.

FITZGERALD, J.:—I concur.

QUEBEC.

COURT OF REVIEW.

MAY 12TH, 1908.

BAKER v. CANADIAN RUBBER CO.

Coram, TELLIER, PAGNUELO and LYNCH, J.J.

*Negligence—Workman—Dangerous Machinery—Liability
of Employer—Motion for New Trial.*

In review of the judgment of the Superior Court, Montreal, January 10th, 1907, awarding plaintiff \$1,250 in accordance with the verdict of the special jury. The plaintiff was employed as a sweeper and to carry hard rubber to the crushing room in defendant's factory. On the day of the accident the rollers between which the hard rubber was passed stuck, which was usual and customary, and the man in charge of the machine went from the front of the machine to the back to pull the rubber free, and while there the plaintiff went to the front of the machine and endeavoured to pull the rubber clear from underneath, and while bending down and endeavouring to free the rubber with his right hand, he, to steady himself, put his left hand on the top of the machine on the rubber, without looking where he was placing it, and the rollers rolled the crude rubber into the space between them, and drew his hand in with it, before he could realize the danger, and he succeeded, by a great effort, in pulling his hand free, but the rollers had crushed it, resulting in his losing a portion of his fingers. The plaintiff sued to recover \$5,000, alleging the following particular acts of negligence on the part of defendant: 1. That he was required to work near dangerous machinery. 2. That he was not warned against it. 3. That the machinery was unprotected and in a dangerous condition. The company traversed the declaration, and pleaded that plaintiff had no business to interfere with the machinery; that he had been repeatedly warned to keep away from it, and that he was engaged and acted as a sweeper and helper with the crude rubber.

LYNCH, J.:—The principal allegation of negligence is that plaintiff was obliged to work near a dangerous machine,

against which he had not been warned. He also alleges that the machine was in bad condition and that it was not properly protected. The plaintiff had no corroboration whatever of his testimony. The plaintiff himself admits that it was not his duty to work on the machine. But plaintiff, while admitting that he was warned about two or three weeks previous to the accident, swears that he was permitted to use the machine, and did use it. Vaillant, the man in charge of the machine, denies this, says that plaintiff was repeatedly warned to keep away, not to meddle, and Arcand, a man working on the next machine, swears that he told plaintiff to keep away. The general foreman was absent at the time of the accident. And, again, Lefrancois (the general foreman) swears he warned plaintiff about a week before the accident to keep away from the machine. Just immediately before the accident Vaillant warned plaintiff to keep away, but plaintiff simply laughed at him. The machine was found by the jury to be in proper condition, the best and latest in design, and that it was protected as much as possible. Under these circumstances, it seems impossible to the majority of this Court that the plaintiff should succeed. Art. 508 C. P. par. 3, is clearly applicable, and the majority of this Court has no hesitation in setting aside the verdict as contrary to the weight of evidence, and being such as twelve reasonable men could not properly find. The only question is, then, whether we should order a new trial or dismiss the action. There being no possibility of further evidence, other than that of the plaintiff, in support of the allegations of negligence, we have adopted the second alternative, and the majority of this Court is of opinion, therefore, to set aside the verdict of the jury, reverse the judgment of the Superior Court, and dismiss plaintiff's action with costs in both courts.

PAGNUELO, J., dissented. The proof shewed that plaintiff had been warned to keep away from the machine, but that was, at least, three weeks before the accident, and, in the interval, plaintiff had been allowed to use the machine and had even been asked to help Vaillant several times. On the day of the accident Vaillant went behind the machine and left Baker in his place. During the operation of freeing the rubber Vaillant said there was danger of the plaintiff being caught, but he did nothing to warn the plaintiff. The jury found there was common fault and reduced damages on that account. The negligence of the company, the

jury declared, was in allowing plaintiff to work at the machine. Baker said he went to the machine to clear the rubber because he had been told there was danger of an explosion when the rubber stuck and he wanted to obviate the danger. The jury based its verdict upon the deposition of Vaillant who admitted that Baker worked at the machine every day. Vaillant, it is true, could not have given orders to Baker except as to the bringing of rubber stock, but he should have insisted that Baker should keep away from the machine and if Baker insisted then Vaillant should have applied to those having the authority to force Baker to obey orders. Vaillant should not have contented himself with telling Baker to keep away. He should have had Baker kept away if he himself had no authority to do it. It was not only necessary to forbid Baker from going near the machine—he should have asked to have his request enforced by those in authority. He had the right to have Baker forced to obey his legitimate request. This is our jurisprudence. I am of opinion, therefore, to disallow the defendant's motion for a new trial or a different judgment, and would confirm the judgment, with costs.

QUEBEC.

SUPERIOR COURT.

MAY 18TH, 1908.

SAPERY v. SIMON, THE UNION BANK (MIS-EN-CAUSE) AND OTHERS.

Sale of Goods — Parties to Contract — Bill of Lading—Delivery—Possession.

ST. PIERRE, J.:—The chief question to be solved in this case is as to which of two purchasers of the same lot of goods should be given preference and obtain delivery.

The facts of the case may be summarized as follows:—Hyman Sapery and Louis Sapery, the plaintiffs, are carrying on business at Montreal as dealers in old metal and scrap iron under the name of "The Syracuse Smelting Works," and John Simon, the defendant, is dealer in similar articles at Halifax, in Nova Scotia.

On the 5th of October Hyman Sapery, being then in Halifax, purchased from Simon, in the name of his firm, a certain lot of old brass, pewter and other metals, at so much a pound, the price varying with the different class of goods, the whole purchase amounting to about one thousand dollars. The goods were to be forwarded at once to the plaintiffs at Montreal, and payment was to be made at thirty days from the date of the delivery.

Simon, however, did not abide by the terms of his contract, and after some delay, during which the price of the metals sold was known to be advancing, he forwarded "three casks of old metal, two bales, four barrels and one keg of same," the whole representing a value of \$620.92, with the bill of lading addressed to the Union Bank at Halifax, said bill of lading made to the order of the said bank, and containing the instruction to advise "The Syracuse Smelting Works" of the arrival of the goods. As the Union Bank of Halifax has no office at Montreal the bill of lading had been mailed by the latter to the Bank of Toronto, which acted as their agent here. Attached to the bill of lading was a draft for \$690.92, representing the value of the goods forwarded to Montreal, said draft made payable at sight. On being notified the plaintiffs at once called at the bank in order to secure the bill of lading which they required for the purpose of obtaining delivery of the goods from the Intercolonial Railway, the carrier of the goods to Montreal, but they were informed that the instructions of the bank were to see that the draft was paid in full prior to their surrendering the bill of lading.

I need not state that so patent a breach of the conditions of the contract which had been agreed to by both vendor and purchasers took the plaintiffs by surprise. They at once telegraphed to Simon complaining of his violation of the terms of the contract. The latter's reply came in the following curt and peremptory telegram which bears date October 27th:—"If the draft is not honored Monday, the 29th, will dispose of goods elsewhere." As the plaintiffs were in immediate want of the goods they had purchased, they insisted that said goods be delivered to them at once, offering at the same time to desist from their right to the thirty days' delay, provided Simon consented to strike off 2 per cent. from the original price, promising that payment would be immediately made after the inspection and the weighing of the goods. Simon answered, first, by the following:—"Have instructed

the bank to give 2 per cent. discount," and afterwards by a letter which bears the same date and reads as follows:—
 "Dear sir,—Your favor to hand, and wire with reference to metals, and I have instructed the bank to allow you 2 per cent on the draft. So kindly honor the draft for the amount less 2 per cent. with reference to scrap lead. I beg to say I cannot do business at 30 days, so therefore I cannot do business with your house. I remain, yours truly, John Simon."

The plaintiffs on receipt of this letter, endeavoured to obtain possession of the goods in order to inspect them and have them weighed, but the bank again refused to give them up unless the draft, less the 2 per cent., the discount mentioned in Simon's letter, was first paid. On the 31st October, the plaintiffs wired Simon as follows:—"Will accept draft if bank will guarantee weights and quality." On the same day, Simon replied:—"Draft must be paid before delivery of the goods." On the previous day, whilst negotiations were pending, Simon, who was well acquainted with Frankel Brothers, the intervenants in this case, sent them the following telegram:—"Quote best on ton copper, half red brass, quarter pewter, Montreal. Wire immediately." Frankel Bros. are in the same line of business in Montreal as plaintiffs. They replied to Simon quoting prices and inviting an immediate acceptance. On the 31st October Simon wired as follows:—"Have instructed the Bank of Toronto to deliver the bill of lading to you. Take delivery of goods at price quoted." In addition, Simon sent a letter, in part, as follows:—"These goods have been shipped to 'The Syracuse Smelting Works' of your city, with sight draft attached, but owing to some disagreement, I have sold the goods to you and will draw on you for six hundred dollars; you can forward me the balance after weighing and checking. Trusting this will be satisfactory, I remain, yours truly, John Simon." The telegram having been delivered late in the afternoon of the 31st of October, and long after the usual closing hours of the bank, no transfer of the bill of lading took place on that day. Herman Frankel swears that he obtained possession of the bill of lading on the following day, the 1st of November, but he is evidently in error. The 1st of November was a legal holiday, and the banks were closed. The transfer itself on the back of the bill of lading bears no date. I am satisfied, however, that it must have been made on November 2nd, after the opening of the bank at 10 o'clock. On the same day the plaintiffs took out their present action against Simon

with a saisie conservatoire in the hands of the Union Bank of Halifax, the Bank of Toronto and the Intercolonial Railway. The object of the action was to secure delivery of the goods then in possession of the railway company, and under the control of the Bank of Toronto, acting as agent for the Union Bank of Halifax, and to coerce the defendant to fulfil his contract. The defendant and the *mis en cause* appeared separately, but did not plead. On the 26th November, after leave obtained, Frankel Bros. intervened in the suit. By their intervention they set up that they had acquired the metals seized from the defendant in good faith and without any knowledge of any other person's rights, they have been put in possession of the bill of lading, and as a consequence they are the sole owners of the goods referred to in the plaintiff's declaration.

I am now called upon to adjudicate both upon the claim urged by the plaintiffs as against the defendant, Simon, and upon the claim of the intervening parties as against the plaintiffs with respect to the ownership of the goods which are now under attachment by means of the conservatory attachment.

The right of the plaintiffs to demand the specific performance of the obligation contracted by Simon, that is to say, the delivery of the goods sold by him to them, is governed by article 1065, C. C., and which reads as follows:—"Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense or that the contract from which it arises be set aside, subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages." As may be observed, the terms used in our article are: "The creditor may, in cases which admit of it, demand the specific performance of the obligation." The goods forwarded to the plaintiff being actually in the sheds of the Intercolonial Railway, at Montreal, I see no difficulty in the way of the contract entered by the plaintiffs on the one hand and Simon on the other being carried out. The next question to be inquired into is that upon the intervention, namely, which of the two contending parties should be preferred and be entitled to the delivery of the goods. Article 1027, C. C., lays down the rule:—" . . . If a party obliges himself successively to two persons to deliver to each of them a thing

which is purely movable property, that one of the two who has been put in actual possession is preferred and remains owner of the thing, although his title be posterior in date, provided, however, that his possession be in good faith." As may be seen by our article, two conditions are essential to the validity of the claim susceptible of being urged on behalf of a subsequent purchaser, (1), he must be in actual possession, and (2), his possession must be in good faith. Can be legitimately contended that the intervenants were ever in actual possession of the goods which are the object of the present litigation? They invoke in their favour the fact that they were put in possession of the bill of lading; but the bill of lading is nothing more than a title to the thing or an authorization to obtain the delivery of it. It may constitute what is known as constructive possession, but not the actual possession required by the article of the code just referred to. All the text writers are unanimous on this point:—16 Laurent, 368, 370; 24 Demolombe, 474, 475; Folleville, "Possession des meubles," 29, 30; Baudry-Lacantinerie, vol. 11, 409, 410, 411. The next condition requires good faith. Good faith here means the purchaser's ignorance of a sale of the same goods to a prior purchaser. It must be shewn that he was "*insciens prioris venditionis*." Now can it be contended that Frankel Bros. were ignorant of the fact that the goods in question had been sold to "The Syracuse Smelting Works." The proof that they knew all about the previous sale leaves no doubt whatever in my mind. They were first made aware of it on the afternoon of October 31st, by one of the plaintiffs, and then by Simon's letter which they must have received on November 1st, or early the following day, and prior to the transfer of the bill of lading and finally by the very terms of the bill of lading itself, which contained an injunction to the bank to advise the Syracuse Smelting Works of the arrival of the goods. The least that may be said is that Frankel Bros. did not actually know all the facts; they knew enough to justify their being put upon their inquiry and nothing more is required to constitute want of good faith on their part.

I have no hesitation, therefore, in coming to the conclusion that the intervention of Frankel Bros. would be dismissed, with costs, and that the conclusions of plaintiffs declaration, first, as against the defendant, and subsidiarily, as against the Union Bank of Halifax, the Bank of Toronto and the Intercolonial Railway, should be maintained also

with costs. As, however, the said three mis en cause have not filed any contestation of plaintiffs' demand, which is to the effect that the contract entered into by the Syracuse Smelting Works on the one side and the defendant Simon on the other side, be specifically carried out, said costs will be against the defendant Simon alone, but said mis en cause must submit to the injunction of the Court ordering them to deliver up the goods in question to the plaintiffs upon payment of whatever charges may be due to them for the conveyance and the storage and keeping of the said goods.

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No. 3

PRINCE EDWARD ISLAND.

SUPREME COURT.

EASTER TERM, 1908.

NELSON RATTENBURY v. GEORGE CARTER AND
ISAAC CARTER.

*Rule Nisi for New Trial — Charge to Jury — Verdict Con-
trary to Evidence — Dealings Outside of Partnership —
Ratification—New Trial Refused.*

W. S. Stewart, K.C., and A. B. Warburton, K.C., for
plaintiff.

F. L. Haszard, K.C., J. J. Johnston and W. A. Weeks,
for defendants.

SULLIVAN, C.J.:—This is an application for a rule nisi, to set aside the verdict of the jury in this case, and grant a new trial. The only evidence submitted to us on which the rule is asked, was the evidence of George Carter, taken by commission in Boston.

The two material grounds upon which the application is based are, first, for misdirection by the learned trial Judge in charging the jury that if, when the promissory notes in question were taken or indorsed, the plaintiff had knowledge that George Carter was using the name of his firm of George Carter & Co. in stock or other transactions of his own, outside the partnership business, for a period anterior down to and about the time the notes in question were given or indorsed, that was notice to him that the firm's name was being used for improper purposes, and should have put him upon his inquiry as to George Carter's authority to bind

the firm by the notes in dispute; and that in the absence of proof of ratification or recognition of George Carter's acts in this regard by Isaac Carter, the other member of the firm, they should find a verdict for the defendants. In view of the evidence as submitted to us and as reported by the trial Judge, we are not of opinion that that was an improper direction.

The other ground is that the verdict is contrary to the evidence. All the evidence bearing upon the questions raised and in controversy was, so far as we can ascertain from the Judge's charge, fully, and we may add in our view, fairly, submitted to the jury with directions not inappropriate to the case; and in so far as the evidence has come under our notice we regard it as amply warranting the verdict.

The rule for a new trial is refused.

FITZGERALD, J.:—I concur.

PRINCE EDWARD ISLAND.

SUPREME COURT.

EASTER TERM.

MAY 5TH, 1908.

JOHN D. G. LELACHEUR v. PERCY MANUEL.

*Collision on Highway—Improper Driving—Horse Killed—
Damages—Contributory Negligence.*

W. S. Stewart, K.C., for plaintiff.

J. D. Stewart, for defendant.

SULLIVAN, C.J.:—This case was tried before me at Georgetown last February Term, when judgment was reversed on account of other business then intervening. It is an action to recover damages in respect of the loss of a horse, killed on the night of 28th January, 1907, in a collision with a horse and sleigh driven by the defendant. The collision took place on a public road in the vicinity of Montague Bridge. On the night in question the plaintiff and one David Brehaut were travelling in the plaintiff's sleigh, the horse being driven by the plaintiff. They were proceeding up the side of a hill on the road which was covered with snow. The sleigh track on which the plaintiff was travelling was on the north side of the road somewhat near the ditch, but the whole of the road south of him was passable. It was a bright,

moonlight night. The plaintiff's horse was walking slowly up the incline. Suddenly two horses and sleighs appeared at a distance of about seventy-five (75) yards and coming down the hill towards the plaintiff. One horse was driven by the defendant and the other by a man named Cameron. What was seen and what took place are thus described by David Brehaut, who was in the plaintiff's sleigh, whose evidence was taken by commission and who was characterized by the defendant in giving him evidence, as a reliable man. Brehaut said:—

“We were going up the road and we saw two horses coming towards us driving. They were driving very fast—racing. They had sleighs and drivers. The plaintiff was driving his horse. He was driving slow—walking. It was a fine clear moonlight night; there was no trouble to see a horse and sleigh. It was no trouble for us to see them. The plaintiff shouted to them as loud as he could. He hollered two or three times to look out and keep back. They did not slacken their pace any. I was in the sleigh with the plaintiff when they came upon us. They were going fast as they ever were and were racing when they came on us. I think they were abreast when they came on us, and appeared to be trying to get ahead of each other. The plaintiff was going right on the track. The horse that was coming on our right passed us without doing any damage. I was on the left side of plaintiff's sleigh. The other horse and sleigh was coming down on our left side. The left shaft of his sleigh struck our horse's breast and brought the horses to a stand still. The shaft pierced the plaintiff's horse's breast. The driver of the horse whose shaft pierced the plaintiff's horse's breast pulled off to his right and passed us on our left. I got out of the sleigh to see what had happened the horse, and when I got up to his head I saw the blood flowing out of his breast. He reared and fell backwards across the road and died. Both drivers passed us and went straight on and said nothing, and never attempted to give us any assistance. Where the collision took place there was a ditch on each side of the road. As far as I could see the plaintiff could not have got rid of the collision; there was no room to go between the two horses that were coming abreast, and there was no room on either side without going up on the bank. On our left side there was no room to pass the horse coming on our left without going up on the bank. I am sure of that. The man who was coming on our left did not attempt to swerve his horse

up to the time of the collision. Wild, fast driving, I believe, caused the collision."

The plaintiff's evidence was to the same effect. At the trial the defendant's negligence was admitted, but it was contended that the plaintiff was guilty of contributory negligence in not having done something to avoid the collision, and that consequently he was not entitled to recover damages. From the evidence adduced it does not appear to me that there was anything the plaintiff could have done other than what he did. None of the evidence submitted satisfies me that there was any want of ordinary care and caution on the part of the plaintiff. In law he is, therefore, entitled to recover: *Tuff v. Warman* (5 Com. B. N. S. 572). But even if there was mere negligence or want of ordinary care and caution on the part of the plaintiff, he would still be entitled to recover, if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff: *Tuff v. Warman* (sup.); *The Bernina* (12 Prob. D. 58).

The evidence makes it clear that if the defendant had exercised even ordinary care, and had gone on his proper side of the road, he could easily have passed the plaintiff without causing injury, as his companion Cameron had done. There was ample space to have allowed him to pass on the proper side of the road, and it was his duty to have avoided the plaintiff's horse and sleigh. The case is a very clear one, and viewed in any way, on the evidence, the conclusion that the plaintiff's horse was killed solely through the defendant's negligence is irresistible.

The remaining question is as to the damages. The plaintiff valued his beast at \$125. There was evidence given at the trial that the animal "might be worth \$80, and if with foal, might be worth \$15 more." The plaintiff's son who gave the mare to his father, bought her about a month before she was killed for \$50 net, and the person from whom he purchased her had paid only \$40 for her a short time previously. The beast was said to be at least thirteen years old.

It appears to me that the sum of \$65 is a reasonable value to place on the animal. The plaintiff claimed \$20 as compensation for loss of time from his work owing to injuries which he alleged he had received in the collision. The evidence does not satisfy me that he need necessarily have lost, at the utmost, any more time from the work in which he said he was employed than a few days and I allow him \$5 dam-

ages in respect of that item. There is an incidental claim for damages to harness, removal of the dead horse, and a fee of fifty cents to the doctor who attended the plaintiff, amounting together to \$5, which I also allow. The total damages I therefore assess at \$75, for which I find a verdict in favour of the plaintiff, on which judgment will be entered with costs.

NEW BRUNSWICK.

FULL COURT.

APRIL 30TH, 1908.

REX v. KAY, EX PARTE GALLAGHER.
 REX v. KAY, EX PARTE WILSON (No. 1).
 REX v. KAY, EX PARTE MELANSON.
 REX v. KAY, EX PARTE ALBAPARE.
 REX v. KAY, EX PARTE HEBERT (TWO CASES).
 REX v. KAY, EX PARTE LEBLANC.

Canada Temperance Act — Conviction — Jurisdiction of Magistrate — Reading Evidence to Witness — Bias.

Orders absolute for certiorari to remove and orders nisi to quash convictions made by James Kay, stipendiary and police magistrate for the county of Westmoreland for offences against the Canada Temperance Act, were granted at Chambers returnable this term. In the Gallagher case there was a ground (set forth in the judgment) in addition to the other cases, but they were all argued together on the 16th April instant, before BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY and WHITE, JJ.

W. B. Chandler, K.C., shewed cause against the orders nisi to quash.

C. L. Hanington (for the defendants Gallagher, Wilson, Melanson and Albapare), and

J. C. Sherrin (for the defendants Hebert and LeBlanc) supported the orders nisi.

In addition to the authorities referred to in the judgment of the Court, the following were cited:—(On shewing cause)—Rex v. Ridehaugh, 7 Can. C. C. 340; Rex v. Jamieson, 12 Can. C. C. 360; Tremear's Crim. Code 502; Seager's Crim. Code 237; Reg. v. Excell, 20 O. R. 633; Reg. v. Scott, 20 O. R. 646. And (in support of the orders nisi)—Reg. v.

Ciarlo, 1 Can. C. C. 157; *People v. Chapman*, 4 Am. S. R. 857; *Seager's Mag. Manual*, 210, 277; *Wakefield Board of Health v. West Riding, etc., Ry. Co.*, L. R. 1 Q. B. 84; *Ex parte Ryan*, 30 N. B. R. 256; *Reg. v. Millidge*, 4 Q. B. D. 332; *Reg. v. Henley* (1892), 1 Q. B. 504.

The judgment of the Court (BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY and WHITE, JJ.), was now delivered by

BARKER, C.J.:—On the 15th day of February, 1908, Gallagher was convicted for having unlawfully sold intoxicating liquor on the 12th of February, 1908, at Moncton, contrary to the second part of the Canada Temperance Act, and adjudged to be imprisoned for one month. This is an application to quash the conviction on the ground that the magistrate had no jurisdiction for two reasons. The first is that the evidence was not read over to the witnesses as required by section 721, sub-sec. 3 of the Criminal Code; that sub-section provides as follows: "If the defendant does not admit the truth of the information or complaint, the justice shall proceed to inquire into the charge, and for the purposes of such inquiry shall take the evidence of witnesses both for the complainant and accused in the manner provided by Part XIV, in the case of a preliminary inquiry." The sections here referred to are 682 and 683. By section 682 it is provided that the evidence shall be taken down in writing in the form of a deposition, and that at the same time before the accused is called on for his defence, it shall be read over to and signed by the witness and the justice. Section 683 provides that the justice holding a preliminary inquiry shall cause the deposition to be written in a legible hand and on one side only of each sheet of paper, provided that the evidence upon such inquiry may be taken in shorthand by a stenographer who may be appointed by the justice, and who, before acting, shall make oath that he will truly and faithfully report the evidence. In that case the reading the evidence to the witness and his signing it are dispensed with, but the stenographer is required to verify his report of the evidence by his affidavit. In the present case the evidence was taken in the usual way by the clerk of the Court, who, though not a stenographer, is a sworn officer of the Court. And there is no suggestion that the evidence was not accurately taken down. We think these sections refer merely

to matters of procedure, and although section 721 may direct the evidence to be read over as contended for, the omission to do so in no way goes to the jurisdiction of the magistrate. The point is really decided by this Court in *Ex parte Doherty*, 32 N. B. R. 479; 3 Can. Cr. Cas. 310.

The other ground relied on as shewing a want of jurisdiction is that the justice was disqualified by reason of bias resulting from some litigation pending between him and Gallagher. The affidavits shew that on the second day of August, 1907, Gallagher was convicted before this same justice for unlawfully keeping liquor for sale, and given a month's imprisonment. A warrant of commitment was issued on that conviction on February 1st, 1908, under which Gallagher was arrested and lodged in gaol. On the 10th of February he was discharged on habeas corpus. Acting under instructions Gallagher's solicitor prepared a notice of action to be brought for false imprisonment. This notice was served on the 13th of February, after the present information had been laid, but before the trial actually commenced. The month required for the notice expired on the 13th of March, and it appears from an affidavit made by the magistrate and not denied, that up to the 11th day of April instant, when the affidavit was sworn, he had not been served with any process in the action nor, so far as he had any information, had any been issued. Disqualification on the ground of bias rests upon an entirely different principle from that which governs cases of pecuniary interest. The information was laid here before the notice of action was given. There is no suggestion that bias was actually shewn. In fact, there was no chance for it as the evidence was all the one way and the defendant called no witnesses. A mere possibility of bias is not sufficient: *Reg. v. Meyer*, 1 Q. B. D. 173; *Reg. v. Handsley*, 8 Q. B. D. 383. If the mere fact of existing litigation is relied on as a disqualification, it is settled that the litigation must be really pending at the time: *Rex v. Byron*, 37 N. B. R. 383. Up to the present time no action has been brought, and the serving the notice of action is in itself unimportant. The order nisi to quash will be discharged in the cases of *The King v. Kay*, *Ex parte Wilson* (No. 1), *Ex parte Melanson*, *Ex parte Albapare*, *Ex parte Hebert* (two cases); and *Ex parte LeBlanc*, argued this term, and in which the only substantial point is the first point in the Gallagher case. The orders nisi in these cases will also be discharged.

Orders nisi discharged and convictions confirmed.

NEW BRUNSWICK.

FULL COURT.

APRIL 30TH, 1908.

REX v. KAY, EX PARTE MELISSA McCLEAVE.

Canada Temperance Act—Conviction—Irregularity.

Conviction under Canada Temperance Act before this Court, on certiorari and order nisi to quash. Argued on April 16th, before BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY and WHITE, JJ.

W. B. Chandler, K.C., shewed cause against the order nisi to quash.

C. L. Hanington supported order nisi.

The judgment of the Court (BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY and WHITE, JJ.), was delivered by

BARKER, C.J.:—On the 7th of January, 1908, Melissa McCleave was convicted before James Kay for unlawfully keeping intoxicating liquor for sale between the 30th day of October, 1907, and the 30th day of December, 1907, contrary to the provisions of the Canada Temperance Act. She was sent to gaol for a month. In addition to the point raised and determined in *The King v. Kay, Ex parte Gallagher*, (ante p. 153), that the evidence was not read over to the witnesses, it is claimed that the accused was misled as to the date of the return of the summons and was thereby deprived of the opportunity of making her defence, and that the justice was disqualified by bias arising out of pending litigation. This applicant, who is the widow of David McCleave, who formerly kept an hotel at Moncton, has made an affidavit in which she states that her husband died on the 18th of October, 1901, intestate, and that letters of administration of the estate had been granted to her. This information was laid by one Dickerson, a police officer, on the 31st of December, 1907. A summons was issued on the same day, returnable on the 7th of January, and served personally on Mrs. McCleave by a police officer, also on the same day. So that a week elapsed between the date of service and the return day. Mrs. McCleave goes on to state in this affidavit that she had been for over a year troubled with an affection

of the eyes whereby her sight was impaired and that it was impossible for her to read without glasses; and that as her glasses were not at hand at the time she asked Dickerson, who happened to be present to read the summons to her: In doing so she says that he read the word "seven" as "seventeen," thereby making the summons returnable ten days later than it actually was. She then goes on to say that she had a good defence to the complaint—not a good defence on the merits, for in none of these applications which are becoming so numerous does there ever seem to be a meritorious defence—and this defence she was prevented from setting up by reason of her being misled as to the date of the return. In her absence she was convicted and now seeks to quash the conviction. It is true that Dickenson has not denied Mrs. McCleave's statement, but it is also true that the police officer who served the summons read it over to her at the time of service and there is no suggestion that he did not read it correctly. The proceedings as they are returned here and as they appear before the magistrate are correct and regular in every way. What is the defence that she wished to set up? It appears that away back in August, 1899, over eight years ago, her husband brought an action in the Supreme Court against Kay, the magistrate, to recover damages arising out of the execution of a search warrant issued by Kay for the examination of McCleave's premises, on which it was alleged were quantities of liquor unlawfully stored, and which, as appears by the declaration, were seized and sold in condemnation. An appearance was entered in October, 1899—a declaration was filed September 26th, 1899, and a plea of not guilty was filed on January 5th, 1900. Although nearly two years elapsed between that time and the date of McCleave's death, the cause was never brought down to trial and nothing whatever has been done with it since his death. Mrs. McCleave by way of explanation for this delay and in order to show that this action is still pending, makes the following statement: "That at or about the same time (that is when the suit against Kay was commenced) another suit on the same cause of action was brought by my said husband against the city of Moncton, which said suit was brought on for trial and tried at the Circuit Court at Dorchester in term A.D. 190 , and a verdict was found in favour of my said husband, and said cause was thereafter appealed to the Supreme Court of New Brunswick, where said verdict was set aside and an appeal was afterwards

taken to the Supreme Court of Canada, and there, after the death of said David McCleave, and suggestion of death by me as administratrix had been made, was disposed of. That on the advice of counsel the suit against the said James Kay was permitted to stand and was not brought down for trial pending the disposal of the action against the city, but it was not the intention of said David McCleave, as I believe, nor was it or is it my intention to allow said suit to abate or discontinue, neither was it my intention to relieve said James Kay of his liability under said cause of action upon which he was sued." The records of the Court enable me to supplement this statement. The case of *McCleave v. The City of Moncton* referred to, was decided on appeal on the 19th of February, 1902, as will be seen by reference to the report in 32 S. C. R. 106. This Court had decided the same case in the previous April (35 N. B. R. 296), when they set aside the verdict for the plaintiff and entered a verdict for the defendants. So that when that decision was affirmed there remained nothing for McCleave to dispose of except pay the costs. Over six years have passed since *McCleave v. The City of Moncton* was finally disposed of. It is put forward that the case against Kay was by the advice of counsel allowed to stand till that case was determined, and yet during the six years that have elapsed nothing whatever has been done with it. Mrs. McCleave, I presume, has given the only, or, at all events, the strongest reason for this delay. So far as I am concerned I can only say that it has not at all impressed me with the belief that she has any intention whatever of going on with the action. Assuming that the cause of action survives to Mrs. McCleave as administratrix of her husband, and that she could revive and proceed with it, it is not her litigation—it is that of her husband. She has no interest in the result so far as the papers show. I should be sorry to relax any rule necessary for the defence of suitors from judgments attributable in any way to the bias of those who give them, but it seems to me going much further than either principle or any authority warrants, to hold that the facts and circumstances I have mentioned afford any objection whatever to the qualification of the magistrate in determining this information.

The order nisi will be discharged.

NEW BRUNSWICK.

FULL COURT.

APRIL 30TH, 1908.

REX v. DAVIS, EX PARTE VANBUSKIRK
 REX v. WATHEN, EX PARTE VANBUSKIRK

Liquor License Act—Minor—Conviction.

Convictions under the Liquor License Act (C. S. 1903, c. 22), brought before this Court on certiorari and orders nisi to quash, granted principally on the ground that a conviction for selling liquor to a minor under s. 67 of this Act imposing a fine, and in default of payment, distress, but not awarding, in default of either, imprisonment, is bad.

The cases were argued together in Michaelmas Term last.

W. B. Chandler, K.C., showed cause against the orders nisi to quash, contending that the conviction could be amended; and secondly, that as the imprisonment was no part of the judgment, but merely a mode of enforcing it, the matter did not go to the jurisdiction. Also, the minute of conviction need not contain anything which the law supplies as a consequence of the sentence: and cited *Reg. v. Vantassel*, 5 Can. Cr. Cas. at page 132.

J. D. Phinney, K.C., in support of the orders nisi, contended that the section not providing any mode of enforcing the penalty, form (15) referred to in s. 22 of the Summary Convictions Act (C. S. 1903, c. 132), must be followed; and cited *Ex parte Watson*, 31 N. B. R. 2; *Reg. v. White*, 28 N. B. R. 216; *Ex parte Melanson*, 28 N. B. R. 660; *Reg. v. Sullivan*, 24 N. B. R. 149; *Ex parte Woodstock Electric Light Co.*, 34 N. B. R. 460.

The judgment of the Court (BARKER, C.J., HANINGTON, LANDRY, McLEOD, and GREGORY, JJ.), was now delivered by

LANDRY, J.:—In the first case an application was made for a rule absolute to quash a conviction had on the 23rd day of July, 1907, for selling liquor to a minor on the 11th day of April, 1907.

Two grounds are urged for the rule:—

1st. The conviction does not adjudge imprisonment in default of payment of the fine or of insufficient distress.

2nd. The defendant was not present in Court when he was convicted, and an adjournment to hear counsel was refused after an agreement by counsel on both sides that such an adjournment would be secured.

As I believe the first ground fatal to the conviction, the second point need not be considered.

Section 67 of c. 22 (The Liquor License Act), provides for a fine of \$20 for selling liquor to a minor, but does not provide any mode of enforcing the payment of the fine. The conviction in this case is under s. 67, and imposes a fine of \$20, and adjudges that if it is not paid forthwith a distress and sale be made. No reference is made in the conviction to imprisonment. As the section itself does not point out the mode to be pursued to enforce the payment of the fine we must look elsewhere for the authority to do so. Section 22 of "The Summary Convictions Act" (Con. Stat. 1903, c. 123), reads in part:—"Subject to the provisions of s. 27, when the law imposes a penalty payable in money or a fine, and no mode is provided therein for the recovery of the penalty or fine . . . the conviction shall be according to the form (15)." Form (15) in case of default in payment orders the fine to be levied by distress and sale, and in default of sufficient distress, adjudges imprisonment. If that enactment providing that the conviction in a case like this shall follow form (15)—which form provides for imprisonment—makes it obligatory to use the term imprisonment in such form appearing, then the conviction is bad. Under the enactment, I believe, the law intends that the form shall be followed, and I further believe the conviction is vitiated because of the absence of that provision in its terms.

In the second case, a conviction was made on the eleventh day of June, for selling liquor to a minor on the 28th day of May. Several grounds were urged for quashing the conviction, including the point that the conviction did not order imprisonment in default of sufficient distress. For the reasons given in the first case, the order should be absolute to quash the conviction.

Orders absolute to quash the conviction in both cases.

NEW BRUNSWICK.

FULL COURT.

APRIL 30TH, 1908.

REX v. KAY, EX PARTE WILSON (No. 2).

Canada Temperance Act—Conviction—Irregularity.

Conviction under the Canada Temperance Act (on an information laid on the 11th of March last), for an offence committed between the 8th and 11th of that month, brought

before this Court on certiorari and order nisi to quash, on the ground (in addition to other grounds), that the conviction was bad for uncertainty as to whether the offence had been committed before the information was laid.

The matter was argued on the 16th of April instant before BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY and WHITE, JJ.

W. B. Chandler, K.C., showed cause against the order nisi to quash.

C. L. Hanington supported the order nisi.

The judgment of the Court (BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY and WHITE, JJ.), was now delivered by

BARKER, C.J.:—In this case there was the objection common to the previous cases—that the evidence was not read over to the witnesses as required by s. 721, s.-s. 3, of the Criminal Code. There was also an objection to the conviction that on its face it is for an offence committed between the 8th and 11th days of March, 1908 (the information was laid on the last named day), leaving it uncertain whether the offence was committed before the information was laid. There is nothing in the point. The information on which the conviction is made could not very well have reference to an offence committed after the information was made.

Order nisi discharged and conviction affirmed.

NEW BRUNSWICK.

SUPREME COURT IN EQUITY.

BARKER, C.J.

MAY 19TH, 1908.

HARRIS ET AL. v. SUMNER ET AL.

Exhibition Association—Incorporation—Objects — Property —Original Capital Stock—Sale of Stock—Discretion of Directors—Confirmation by Company—Form of Bill.

J. D. Hazen, A. G. and F. R. Taylor, for the plaintiffs.

M. G. Teed, K.C., for the defendants.

BARKER, C.J.:—"The Moncton Exhibition Association Company, Limited," one of the defendants, was incorporated

by an Act of the Provincial Legislature in 1903 (3 Ed. VII. c. 87), with a capital of \$10,000, divided into 1,000 shares of \$10 each. Its objects are specifically set forth in s. 3 of the Act; but, speaking generally, it was incorporated at the instance of a large number of the wealthiest and most influential residents of Moncton, for the purpose of establishing a permanent exhibition at that place. In order to accomplish that object, the company was authorized to acquire property, erect buildings, hold exhibitions, award prizes, and do such things as are usual in the management of matters of this kind. Nine provisional directors were named in the Act for the purpose of organizing the company, but the permanent Board was to consist of five members (a majority of whom were required to be residents of Moncton), elected from the members of the company, and a further number, not exceeding fifteen, to be chosen from the members by the five members of the Board first elected. It was provided by the Act that the selection of these fifteen members was to be made, so that, as far as possible, the principal branches of trade, commerce and agriculture should be represented at the Board. At present the Board consists of fifteen members, all of whom have been joined with the company as defendants in this suit. After the company had been organized the directors proceeded to the selection of a suitable property for their purpose. Several sites were examined, but the directors finally settled upon the present one as being in all respects the most desirable. It comprises about 31 acres, within a mile of the central part of Moncton; it is well drained; it is in the immediate vicinity of the Intercolonial Railway, whose tracks can, at a moderate cost, be laid to the exhibition grounds, so that live stock, intended for exhibition, can be conveyed direct to the buildings. The company purchased the property for \$4,990, and by their financial statement for the year ending with March, 1907, there had been expended on the race track, erection of stables and other expenses in improving the ground and fencing it, the sum of \$7,466.41. No buildings for exhibition purposes have as yet been erected, though I understand plans have been made for the purpose. The property is subject to a mortgage for \$6,000 for money borrowed to pay the purchase money, and for improvements.

This Association was actively promoted by the defendant, Mr. D. I. Welch, a prominent member of the Moncton Bar, who has resided in that city for many years and taken an active interest in its advancement. There are probably

differences of opinion in reference to the advantages to be derived from exhibitions to be held annually or at stated intervals. They are certainly most common throughout the Dominion, and both governments and municipalities are continually recognizing their utility and their public character by substantial money grants made in their aid. What the plaintiff's view on this subject is I do not know, but Mr Welch, and the directors, co-operating with him, entertain very decided opinions that such an association properly supported, while it might not and probably would not, bring any direct return to the shareholders in the way of dividends, would be of immense advantage to the city generally. Acting on this view they prepared a stock list, solicited subscriptions, selected the site, secured the property, and gave their time and labour gratuitously to the work, so far as it has progressed. Some 593 shares were subscribed for by upwards of 100 persons, in various amounts from one share up to fifty. Of these the plaintiff took two shares, and according to the list of shareholders submitted to the annual meeting in May, 1907, the defendants then held in all 195 shares. From 1904 up to June, 1907, there was no material change in the holdings, new shareholders did not come forward. The plaintiff seems to have acquired seven shares during that period. Such was the condition of matters in the early part of 1907, when the Dominion Government acquired a tract of some two or three hundred acres of land adjoining this exhibition tract, for the purpose of erecting the new Intercolonial car works, and the result was that land in the vicinity rapidly advanced in price. According to the plaintiff's evidence the exhibition property which had been purchased some three years before for \$4,990, and the improvements on which were unimportant in value except for the special purpose for which they were intended, had become worth some sixty or seventy thousand dollars. This is probably an over-estimate, but there does not seem to have been a substantial advance. The defendants estimate the value at from \$20,000 to \$25,000. The plaintiff seems to have set about immediately to purchase shares, and by the 15th July, 1907, he had acquired in all 188 shares, nearly all of them at a premium, and some of them for \$25 a share. At this time 407 shares of the original capital stock of the company had never been subscribed for. In May, 1907, Mr. Welch, who was then, and always has been, secretary of the company, subscribed the original subscription list for these 407 shares, and deposited with

himself, as representing Mr. Clark, the treasurer of the company, his own cheque for \$4,070, being the par value of the stock. In doing this Mr. Welch acted without the knowledge of the directors in any way. He did not consult, but acted, or at all events professed to act, under a resolution or by-law of the company passed in 1906, authorizing the sale of the unissued stock. The minute book of the company had been destroyed by a fire which took place in Mr. Welch's office. At all events it, with other books, had never been seen since the fire. But the fact that such a resolution had been in fact passed was sworn to positively by Mr. Welch. The subscription for these unissued shares soon became known to the plaintiff. He immediately protested against their being so disposed of, and claimed a right as a shareholder to participate in any disposal of these shares. His claim as now put forward and as put forward before the directors' meeting on the 15th of July is, that as a holder of 188 shares he was absolutely entitled to a pro rata number of these 407 shares, or if they were not allotted among the existing shareholders, that they should be sold at auction for the benefit of the company. Mr. Welch, in consequence of the plaintiff's action, consented to submit the matter to the Board. His cheque was not presented for payment, and the matter came before the directors at a meeting held on the 15th July, 1907, at which, according to the minutes, the following directors were present, that is, the defendants Bell, Kinnear, Thompson, Harris, Humphrey, Jones, Clark, McCuag, McSweeney, Masters, Higgins, and Sumner. When the question of Welch's subscription for these shares came up for discussion, Senator McSweeney read two letters which the plaintiff had given him for the purpose. Only one of these is important. It is dated July 15th, 1907, addressed to the directors of the company, and is as follows:—

“Gentlemen,—On behalf of myself and other stockholders of the above named company, I do hereby protest against the sale of the treasury stock of this company in any other manner than by first offering it to the present stockholders of the company pro rata, and in default of their accepting their respective allotment the placing of it to public competition by public sale. Any other method of the disposition of such treasury stock would be unjust, unconstitutional and contrary to the spirit and provisions of the N. B. Joint Stock Companies Act, being c. 85 of the Consolidated Statutes. Yours respectfully, Geo. L. Harris, on behalf of myself and other stockholders of the Maritime Exhibition Company.”

The minute of the meeting recording the Board's action as to this letter and the subscription for the shares by Welch is as follows:—"Senator McSweeney presented two letters from Mr. George L. Harris, which were read to the meeting, and on motion ordered to be filed. The secretary reported that he had personally subscribed 407 shares of the unsold capital stock, believing it to be in the interests of the company to do so. It was moved by Capt. Masters, and seconded by W. F. Humphrey, that the sale of the 407 shares of the capital stock of the company to Mr. Welch be ratified and confirmed, and the officers of the company authorized and directed to issue a stock certificate for the same to him, on payment for the stock."

It is therefore plain that in taking this action the directors acted with full knowledge of the plaintiff's claim, and the ground upon which he based it. A certificate for the 407 shares was then issued to Welch, and at the same meeting, or at all events immediately afterwards, the defendants purchased from Welch shares as follows:—Sumner 50, Senator McSweeney 25, Kinnear 10, Clark 10, Bell 10, Marr 20, Humphrey 20, John H. Harris 10, Cole 10, Masters 5, Jones 10, Higgins 20, and McCuag 10. For these they paid par, or at the rate of \$10 a share. Mr. Welch states, and in this he is confirmed by all the directors, that it was understood between them, as a condition of Welch's sale to them, that they should all stand together and hold the property for exhibition purposes and not permit it to be sold. This suit was commenced a few days later.

The plaintiff has sued on behalf of himself and all other shareholders of the company, and in his bill he alleges that the sale of the stock to Welch was not made bona fide and that he was acting merely as agent for the directors in the transaction, and that it was part of a plan by which they procured the stock at par, which was far below its value. Section 18 is as follows:—"That the defendants have fraudulently conspired among themselves, knowing the value of said treasury stock to be far more than par, to take it up themselves at a price or sum far less than its real worth, and thereby depriving the company of the profits they could have obtained by the sale of the said stock in the open market, or depriving the other shareholders of the benefits they would obtain by a pro rata distribution of the said stock

among themselves at the price of par." Section 20 alleges that the issue of stock was ultra vires of the directors, and made without any lawful authority from the company or otherwise, and that it was fraudulent and a breach of trust on the part of the directors. The bill prays a declaration that the issue of the stock to Welch was fraudulent and in excess of the powers of the directors, and that the transfers should be set aside, or that the holders hold them in trust for the company. It will be seen, therefore, that the plaintiff seeks no relief for himself. The only relief asked for is for the company.

There is no doubt in my mind that the plaintiff's sole object in buying up these shares was to obtain control of the company with a view to forcing a sale of the property for the pecuniary benefit of himself as a shareholder, quite regardless whether or not the result would be to destroy the association, and entirely defeat the purpose and object for which it was incorporated. So long as it gave no prospect of any direct pecuniary return, the value of two shares represented his interest in it, and he was willing to leave its management to those who were gratuitously giving their time and their labour for the purpose. But when by a combination of circumstances, in no way brought about by him, the property, according to his estimate, ran up in value from about \$166 an acre to \$2,000, matters assumed an entirely different aspect. It is due to the plaintiff to say that he has not disguised his object, and that in coming here he is not asking for favours, but demanding rights. It is, however, due to the general body of shareholders to say that, so far as the evidence shows, not one has come forward in support of this action or of the policy and purpose which are at the back of it.

The plaintiff rests his claim on two grounds. In the first place he contends as a shareholder, having at the time 188 shares, he was entitled as of right to a pro rata share of this unissued stock, and that the directors had no legal right to withhold them. And in the second place he charges the directors with fraud in securing the shares for themselves, and with doing an illegal act in disposing of them at par, when they were worth a premium in the open market. The plaintiff has not always put forward his claim in the same terms. In the first place he claimed a right to 188 shares, because the directors, or a majority of them, had been allowed to double their holdings. So strong was he in that view that,

on going to Boston a day or two after the meeting held on the 15th July, he left a certified cheque for \$1,880 with Welch to pay for these 188 extra shares at par; and so strongly did he feel on this point that he sent a telegram from Boston to the defendant John H. Harris threatening some very dreadful things if his demand was not acceded to. The plaintiff is a lawyer, and, I presume, conversant with matters of this kind, and it does strike me as unusual that, with his knowledge of this alleged illegality, and his opinion as to the fraud alleged to be wrapped up in this transaction, he should have evinced such a determination to be a participator in it. Dealing with the case as it is now presented, I understand that, as a matter of law, it is contended that under no circumstances, unless by some special authority by statute, can directors sell the original shares of a company except at the market rate where they are at a premium. And I also understand it to be argued, that as regards these 407 shares in question, the directors were obliged to offer to allot them among the existing shareholders at a fixed price, and as to those shares not accepted they must be sold at public auction. I do not agree with either of these propositions. I think there is a distinction which has escaped the plaintiff's attention between the original shares of a company and an added or new issue of stock. It is true that without special authority original shares cannot be parted with at a discount, because if that were so in the case of compromise with limited liability, the shares would not realize what they are bound to pay, that is, the face value in full. That is the price the holder pays for the immunity from further liability. This would not be done if they were sold at a discount and the company would never realize from its shares the capital authorized for its operation: *North-West Electric Co. v. Walsh*, 29 S. C. R. 33; *Ooregum Gold Mining Co. v. Roper* (1892), A. C. 125. But there is no rule, that I am aware of, which absolutely prevents directors, who represent the company and have the most of its powers, from selling shares where they are at a premium, except at that premium. In *Hilder v. Dexter* (1902), A. C. at page 480, Lord Davey says:—"I am not aware of any law which obliges a company to issue its shares above par because they are salable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide." The same opinion is expressed by the Lords Justices in *In re London and Colonial*

Finance Corporation, 77 L. T. Rep. 146. It seems to me a mistake to say that these shares had any marketable value in the proper sense of that term. What was it? No one was buying or wishing to buy except the plaintiff. For his purposes he was willing to pay all the way from par to \$25 a share. What premium between these two limits represents the market price? This case seems to me to be one in which the discretion of the directors may well be exercised; and when once the sale is made at par, it is not competent for a private shareholder to question the exercise of discretion by the directors. That is a matter between them and the company. What possible difference there can be as to the right of selling these 407 shares and the remainder of the 1,000 shares previously sold I cannot see. The Attorney-General alluded to the time that had elapsed between 1904 and 1907, during which no stock was issued, but that can have nothing to do with the point. I admit that as to the issue of new stock that is not the original capital stock; there is a different rule. In my opinion the directors had a perfectly good right in the exercise of their discretion to dispose of the shares to Welch, always supposing the transaction was bona fide. As to that the direct evidence is all one way, and unless I am to disregard it altogether, my finding must be in their favour. It was put forward as a strong argument in support of the plaintiff's allegation in the bill as to the want of good faith on the defendants' part, that the company, as a business venture, had not been a success; that up to the present time the net proceeds had not been large, and that it would be entirely disregarding all the rules by which facts are inferred, to find, first, that Welch, a man of moderate means, should, as a mere philanthropic act, borrow \$4,000 in order to purchase these shares; and second, that all these directors should, with the same unselfish motive, contribute their money and double their holdings in this company, with no expectation of gain to themselves, beyond what might come to them in common with the citizens of Moncton generally. It was said that these defendants were shrewd business men, and that it would be most unreasonable, after all that had taken place, to infer that they had really any other object in view than the money which they would make by reason of the enhanced value of the company's property. I recognize the force of this argument, but it is not conclusive. Of the fifteen defendants, all save three gave evidence. In the most unreserved way they all swear that they knew nothing of Welch taking the shares

until after he had subscribed for them, that he was in no way acting for them, and that they had nothing whatever to do with it until after the sale had been ratified by the directors at their meeting on the 15th of July; and that when they purchased from Welch, it was with the distinct understanding that the object of the company, that is the exhibition project, should not be sacrificed by a sale of its property. It was also said that if the plaintiff had been allotted the shares which he claimed, he would not have a controlling interest. That is true, but he would have been so much nearer the accomplishment of his purpose. It is also said that another site was available for exhibition purposes, and therefore the sale of the company's present property did not necessarily involve a destruction of the company itself. The evidence shows that there is one other available site, which, though not nearly so suitable or convenient for exhibition purposes at present, might answer the purpose. It is, however, common knowledge that the difficulties which stand in the way of organizing and establishing on a working basis associations of this nature, are so great as to render it impossible that a second attempt would be made, or, if made, that it would be successful. From supposing that in taking these shares these defendants acted bona fide for the purpose of preserving the company and in order to carry out the objects for which it was incorporated and defeat the plaintiff's efforts in an entirely opposite direction, does the transaction necessarily become fraudulent or illegal, because it may turn out that at some future time the property may be sold, and the defendants derive some benefit from its advanced value, as holders of these shares? I think not. The directors in what they did, have done nothing which the company itself could not have done; and if they have been guilty of negligence or improper conduct in the management of the company's affairs or the disposal of its property, or have done an act which, as between them and the company, may be voidable, the company itself can ratify and confirm what the directors have thus done, and in such cases the minority of the shareholders must yield to the majority: *Patrick v. The Empire Coal Co.*, 3 N. B. Eq. 571, and cases there cited.

I take it as settled by numerous authorities that in any case like the present, where there is an absence of fraud and where the act complained of is not ultra vires the corporation itself, the majority of the shareholders are the only persons who can complain, provided they are not themselves the wrongdoers, and that any proceeding calling the act in ques-

tion must be in the name of the company itself, unless the company refuses to act: *Foss v. Harbottle*, 2 Hare 461; *Mozley v. Alston*, 1 Ph. 790; *McDougall v. Gardiner*, 1 Chan. D. 13.

Precisely the same rule given in the United States: *Hawes v. Oakland*, 104 U. S. 450.

In *Gray v. Lewis*, 8 Ch. Ap. 1050, James, L.J., says: "It is very important in order to avoid oppressive litigation to adhere to the rule laid down in *Mozley v. Alston* and *Foss v. Harbottle*, which cases have always been considered as settling the law of this Court, that where there is a corporate body capable of filing a bill for itself, to recover property either from its directors or officers, or from any other person, that corporate body is the proper plaintiff, and the only proper plaintiff. One object of incorporating bodies of this kind, was, in my opinion, to avoid the multiplicity of suits which might have arisen, where one shareholder was allowed to file a bill on behalf of himself and a great number of other shareholders." Now the sole object of this bill is that these shares should be returned to the company as part of its assets, illegally in the hands of the directors. But the company must have the right to say, even if the transaction could be regarded as a voidable one, we will confirm it, for it was a beneficial act done in the interest of the whole body of the shareholders. That right cannot be taken away from the shareholders at the will of an individual shareholder by filing a bill and carrying on litigation of his own, in reference to the company's affairs, simply because for reasons personal to himself he happens to differ from everyone else interested: *Burland v. Earle* (1902), A. C. 83.

The bill must be dismissed with costs.

NEW BRUNSWICK.

BARKER, C.J.

MAY 19TH, 1908.

SUPREME COURT IN EQUITY.

CUMMINGS v. GIBSON, ET AL.

Demurrer—Multifariousness—Convenience of Parties.

Peter Hughes, for the plaintiff.

D. McLeod Vince, for the defendants.

BARKER, C.J.:—This is a demurrer to the bill for multifariousness.

It appears by the bill that in October, 1887, the plaintiff borrowed some \$5,000 or \$6,000 from one Wm. Gibson, for

which he gave a chattel mortgage as a security, and also a mortgage on two lots of land. Some three or four years later the plaintiff borrowed from Gibson a further sum of \$259.98, and to secure its repayment the plaintiff and his wife conveyed what is known as the Moore and Dickenson lots to Gibson. Though this conveyance is an absolute one, the bill alleges that it was in fact made only by way of security for the loan. At the same time and as an additional security the plaintiff assigned a paid up life policy of insurance for \$213. The bill goes on to allege that in addition to various payments in cash and by the delivery of goods and produce on account of these loans, Gibson received some \$1,100 for the Moore lot and one of the other lots which he sold, and that in this way he has been more than paid what is due him on the loans, and that he is therefore entitled to have the mortgage cancelled, and the life policy and the other property remaining undisposed of, reconveyed to him. Gibson died in February, 1902, leaving a will by which, with the exception of a small annual allowance secured to his widow, he gave all his property of every kind to his eight children, who together with the executors of the estate have been made defendants in this suit. This is what I may call the first cause of action.

The bill then goes on to allege that in November, 1886, the plaintiff purchased from Gibson two lots of land known as the Griffiths lots for \$600, and that at the time he paid \$300 on account of the price and on the 21st May, 1888, he paid the balance, but that at his request the conveyance was not made at the time, but that it was to be made whenever he requested it. Gibson however refused to make any conveyance, and this bill is filed to compel a conveyance of these lots. This is the second cause of action, and the ground of demurrer is that these defendants cannot, or at least ought not, to be joined in one suit as they are not interested in the result as to both causes of action. I am by no means sure that the executors are not necessary parties in both cases. They are the persons who now represent the payments, to whom any balance of the loans which may be found due will be payable, and they have an interest in the contract as to the Griffith lots, for it is their testator's contract which it is sought to enforce. Apart however from all this, there is but one plaintiff here, and it is a question of discretion in the Court, to be determined

upon considerations of convenience in reference to the circumstances of this particular case, whether or not the matters in controversy can be properly disposed of and dealt with in the one suit: *Campbell v. Mackay*, 1 M. & C. 603; *Coates v. Legard*, L. R. 19 Eq. 56.

In the latter case Sir Geo. Jessell, M.R., says that the question is, according to *Pointon v. Pointon*, L. R. 12 Eq. 547, whether the various subjects as to which relief is sought are such as, if fit for discussion, can be properly dealt with in one suit. I am altogether unable to see any reason why this cannot be done here. No one can be inconvenienced by such a course, and to compel these parties to carry on two suits where one answers every purpose would be to cause unnecessary expense without doing any person any benefit.

The demurrer must be overruled with costs.

NEW BRUNSWICK.

BARKER, J.

MAY 19TH, 1908.

SUPREME COURT IN EQUITY.

McKENZIE v. McLEOD ET AL.

Mortgage — Redemption — Notice of Sale—Tender—Money Paid into Court—Reference — Exceptions — Interest—Condition Attached to Tender—Costs.

M. N. Cockburn, K.C., and J. W. Richardson, for the plaintiff.

M. MacMonagle, K.C., for the defendants.

BARKER, C.J.:—The mortgage in question was made by one Alexander S. McKenzie, the husband of the present plaintiff, to one Howard B. McAllister, on the 12th November, 1896, to secure the sum of \$500 and interest. It was assigned on the 6th March, 1897, to one Hattie F. Clark, wife of Augustus T. Clark. The Clarks assigned it to the defendant, Mary Ann McLeod, on the 25th February, 1907, and by various conveyances the equity of redemption became vested in the present plaintiff. Her husband died intestate on the 11th October, 1901, leaving three children, who by their

separate conveyances transferred their interest in the equity of redemption to the plaintiff. These conveyances are dated respectively as follows: October 13th, 1906; March 29th, 1907, and April 5th, 1907. On the 14th March, 1907, a little over a month after the mortgage had been assigned to the defendant, she and her husband gave a notice of sale, under the power contained in the mortgage, to take place on the 24th of April. On the 4th of April the plaintiff made a tender of what she alleged to be due on the mortgage and expenses, \$414 in all. This was not accepted. The plaintiff then filed this bill, and on her application I granted an injunction staying the sale, and ordering the \$414 to be paid into Court, where it still remains, subject to the order of this Court. That order was made April 15th, 1907, and the money was paid in on the 20th of that month. When the cause came down for hearing I referred it to a referee to report the amount then due on the mortgage, as well as the amount due on the 4th April, 1907, when the alleged tender was made. The Referee has reported that on the 4th April, 1907, the sum of \$355.53, and on the 4th February, 1908, the sum of \$372.67 was due, including in both cases a sum of \$7 to cover the expenses of drawing and publishing the notice of sale. In computing the amount due the Referee allowed interest at the rate of 8 per cent. as stipulated for in the mortgage until the due date of the several instalments, and on over-due principal at the rate of 6 per cent. Exceptions were filed and this matter now comes before me on a motion to confirm the Referee's report. The Referee does not seem to have had any evidence before him except the commission issued for the examination of Clark, to shew the payments made while he had the mortgage. The defendants filed an account before the Referee by which they claimed for principal and interest due February 4th, 1908, \$591.10 as against \$365.67 as reported by the Referee, a difference of \$225.43. The first exception relates to the admissibility of some evidence before the Referee taken under the commission. I disposed of that on the argument adversely to the defendants. The second exception is as follows:—"Referee improperly disallowed simple interest at the rate of eight per cent. per annum after each instalment became due, although evidence is that each payment (except one) was for interest at 8 per cent. per annum by agreement after interest was due from time to time." The proviso for

payment in the mortgage is as follows: "Provided always that if the said Alexander S. McKenzie, his heirs, &c., shall and do pay unto the said Howard B. McAllister, his heirs, &c., the full sum of \$500 in five equal annual instalments of one hundred dollars each with interest semi-annually thereon at 8 per cent., as by five promissory notes of even date herewith given." These notes are made payable "with interest semi-annually at eight per cent." It was not denied that interest under a proviso such as this could only be allowed at the rate of 6 per cent. on payments overdue as settled by *St. John v. Rykert*, 10 Can. S. C. R. 278, and *The Peoples Loan Co. v. Grant*, 18 C. S. C. R. 262, and followed in this Court (prior to the date of this mortgage) in *Hanford v. Howard*, 1 N. B. Eq. 241, unless there was some binding agreement to the contrary. There certainly is no such agreement in the mortgage itself, but assuming for the sake of argument that a subsequent agreement between the parties could be made in consideration of forbearance or some other good consideration, charging the property with interest by way of damages after default at a rate exceeding the statutory rate, has that been done here? The defendants set up in their answer that such an agreement was made, and the onus of establishing it is on them. I think I may assume that there never was any such agreement made either orally or in writing. If there had been, the fact could easily have been proved. Am I to infer it, and if so upon what facts? The Referee has simply made a calculation of the interest on the basis that six per cent. was to be the rate after the due date, and he has credited payments amounting in all to \$506. The defendants dispute not only the correctness of the principle upon which this calculation is made, inasmuch as 8 per cent. instead of 6 per cent. should have been allowed, but they also dispute the correctness of the amount of the credits, and allege that the \$506 is too much by \$148. I have no doubt whatever that the \$506 is the correct amount. The receipts, endorsements on the notes, and the positive evidence of Clark all show it, and it was on that basis the defendants themselves arrived at \$405 as the amount due when they purchased the mortgage, and which they paid for it. The other point is not so easily disposed of, but after giving the matter careful consideration, I have come to the conclusion, under the peculiar circumstances of this case, that the plaintiff has no

just ground of complaint if she is held liable for the interest at the higher rate. The plaintiff has produced receipts for the eighteen payments, which together make up the \$506 credited. The first two are for the interest due in May and November, 1897, before default, and are unimportant. The third one is dated June 13th, 1898, and is "in full of interest on mortgage to May 12th, 1898." All of the other receipts down to that of November 12th, 1901, nine of them I think, are all for interest in full to a certain date, or are on account of interest due at a certain date. The receipt dated November 12th, 1901, which is the last in that particular form, is as follows: "Rec'd of J. D. McKenzie thirty dollars interest on mortgage to date." These receipts all given by Clark, to whom all the payments were made. This last \$30 made \$200 in all paid up to that time specifically for interest, and there had accrued due up to that time \$200, if the 8 per cent were allowed, as it of course was. One of the notes had been overdue then for four years, one for three, one for two and one for one, and the remaining note fell due on the 12th November, 1901. Now I find it difficult to see upon what principle such a payment can be recalled. If A. voluntarily pays B. \$100 in full for interest on a certain mortgage to a certain date, and both parties know that the interest is calculated at the rate of 8 per cent., how can it be said that A. has not agreed to pay it? He has not only agreed to do so but he has actually done so, and in the absence of any mistake of fact or of law—and there is no suggestion here of either, there is certainly no evidence of either—I think such a payment ought not to be disturbed. That however does not necessarily give rise to an inference as to future transactions of a similar character, where the precise object of the payment is not stated. On the 8th February, 1904, there was a payment made of \$50. Of this \$40, according to the terms of the receipt, was for interest and \$10 on account of principal. On the 16th February, 1903, \$10 was paid on account of interest, and a similar sum on the 5th July, 1903. These two with the forty dollars paid on the 8th February, 1904, made up the \$80, or two years' interest from November 12th, 1901, to November 12th, 1903. The last three payments, amounting in all to \$216, are represented first by a receipt for \$66, dated December 7th, 1904, which is said to be on account of interest—one is for \$50, dated December 7th, 1905, and the last for \$100 on account. By

these receipts it may be said the plaintiff has neither made nor assented to any specific appropriation of the money, and she is therefore free to insist upon her legal rights as to the statutory rate of interest after November 12th, 1903. To a certain extent this is so. When, however, in the case of a series of transactions like these, between mortgagor and mortgagee in reference to the same security, and extending over a period of ten years, for more than half of which the mortgagor was in default, you find them uniformly adopting a certain rate for the calculation of their interest, and payments are made on that basis, and there is no suggestion of mistake, the inference is not unnatural that as to later payments of interest on the same mortgage, the same rate has been agreed to, though the evidence of the fact may not be so clear. It is not a necessary inference, but, in the absence of evidence to the contrary, it is not, I think, an unreasonable one. Before this suit was commenced the plaintiff proceeded to make a tender of the amount due, and in doing so, her solicitor on her behalf, in addition to offering the \$414 tendered, served the defendants with a formal notice signed by the plaintiff, in which is shewn how the \$414 is arrived at. After stating her desire to redeem the property and pay all the moneys due on the mortgage, it states thus: "I herewith and at the same time of the service of this notice upon you, tender you the said Hugh A. McLeod, and you the said Mary Ann McLeod, with the said money so due thereon (that is on the mortgage) as follows. The amount due on the said mortgage at the date of assignment to you, and which amount you paid for the said assignment \$405 00 "Interest on \$405 from February 25th, 1907, to

April 5th, 1907, at 8 per cent.	3 46
" Costs of publishing notice of mortgage sale....	4 00
	<hr/>
	\$412 46

There is a very material difference between the amount due if interest is allowed at 8 per cent., and the amount if it is allowed at 6 per cent. The plaintiff in serving this notice was not seeking to effect a compromise of some disputed claim. She had never had any dealings with the defendants in reference to this mortgage at all. She had all the receipts in her possession, she knew exactly what she had paid. She knew that the \$405 paid by the defendants, and which she calls "the amount due on the said

mortgage at the date of assignment to you," was made up by allowing interest at the rate of 8 per cent., and in order to compute the amount due at the time of the offer, she adds the subsequent interest computed also at 8 per cent. Having the payments, it was a very simple calculation to arrive at the amount due for principal and interest. If it is made up on a 6 per cent. basis the balance will be some \$80 less than what this tender makes it. It is unreasonable to suppose the plaintiff or her solicitor was willing, without being even asked to do so, to throw away this sum for no purpose whatever. I regard it as a deliberate adoption of that amount as due, and as strong evidence that the plaintiff recognized a liability to pay interest at the rate of 8 per cent., and was willing to act upon it. There is another circumstance pointing to the same conclusion. In par. 4 of her bill in this suit, the plaintiff sets out the assignment of the mortgage by Clark to the defendant as having been made for the sum of \$405, "being the amount then due for principal and interest under and upon the said mortgage." These are not words of recital taken from the assignment, for they are not there; they are the allegations of a fact by the plaintiff in her bill. In s. 12 the notice of the tender is set out, and there follows an allegation "that there was tendered and offered to the defendants the sum of \$414 of lawful money of Canada, as the amount then due from the plaintiff to the defendants under and upon the said mortgage in part recited and referred to in the second paragraph of this bill, and as the consideration for which the plaintiff was entitled to have the mortgage cancelled." And in the interrogatories the defendants are asked this question in s. 4: "Was not the sum of \$405 the amount then due upon said mortgage, and if not, what amount was then due thereon?" In an affidavit made by the plaintiff's solicitor verifying the bill for the purpose of applying for the injunction, he states the particulars of the tender which he made. He says: "I then told her" (that is the defendant, Mary A. McLeod), "that I had, as solicitor for Martha D. McKenzie, the amount of \$412.46 to offer her the said Mary Ann McLeod and the said Hugh McLeod to pay the amount as far as I could ascertain what was due for principal, interest and costs of advertising sale of property, and that I would, &c." I do not wish to be considered as holding that a mere tender of a specific sum of money by a mortgagor to

a mortgagee as the amount due on the mortgage is necessarily evidence against the mortgagor of the amount due. The circumstances here are however unusual. The only question I am now dealing with is whether the plaintiff has herself fixed or assented to the appropriation of the last three payments to the payment of interest computed at the rate of 8 per cent., as she had done in reference to previous payments. In order to demonstrate to the defendants that her tender is sufficient, she undertook to show how she makes up the amount then due on the mortgage, and she takes as a starting point the \$405 paid by them on the 25th February, 1907, as the amount due at that date, and she adds the subsequent interest made up at 8 per cent. In the notice of tender she says: "The amount due on this mortgage at the date of the assignment to you and which amount you paid for the assignment was \$405." If you eliminate the question of mistake, this statement can only be true on the theory that the payments in question were made like the previous ones in pursuance of an agreement to pay the 8 per cent. interest, which must be inferred from the circumstances. This however has no reference to future transactions, and I am disposed to think, notwithstanding that the plaintiff charges herself in the notice of tender with 8 per cent. after the 25th February, 1907, in making up the amount to be tendered, she is not bound to pay over 6 per cent. The amount due for principal and interest I state as follows:—

Principal	\$500 00
Interest at 8 per cent. from November 12th, 1896, to February 25th, 1907, at 8 per cent., 10 years and 105 days	411 51
Interest from February 25th, 1907, to 4th April, 1907, 38 days at 6 per cent.	3 12

\$914 63

Deduct payments 506 00

Amount due April 4th, 1907..... \$408 63

The amount due on the 4th February, 1908, will be
\$433.78, made up as follows:

Principal	\$500 00
Interest at 8 per cent. from November 12th, 1896, to February 25th, 1907, 10 years and 105 days	411 51

Interest from February 25th, 1907, to February 4th, 1908, 344 days at 6 per cent.	28 27
	<hr/>
	\$939 78
Deduct payments	506 00
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Amount due on February 4th, 1908	\$433 78

As to the charges claimed by the defendants amounting in all to \$48.55, the Referee allowed two: \$3 charged for preparing the notice of sale for publication, and \$4 paid for publishing it. These are the amounts charged by the defendants' solicitor for these services, and there is no evidence that any other services were performed. I think the Referee was right in rejecting the others. Adding this \$7 to the above balances there was due on all accounts on the 4th April, 1907, when the tender was made, \$415.63, and on the 4th February, 1908, \$440.78.

I come now to the question of costs, and first as to the alleged tender. That the plaintiff's solicitor in his interview of the 4th April with the defendants had a bona fide intention of paying them all to which they were entitled under this mortgage there can be no doubt. He had the money with him for the purpose; he made no objection to the defendants' own method of making up the account. It is equally clear to my mind that they placed every obstacle in the way which they could, and that before the suit was commenced as well as afterwards there seems to me to have been one principal object in view—to make this suit as expensive and oppressive as possible. It is not necessary to inquire whether or not, in view of the defendants' absolute refusal to give any information as to their expenses, the tender might not be considered sufficient as to amount, because I think it did not amount to a legal tender by reason of the condition attached to it. There is no doubt from the evidence as well as from the terms of the notice to which I have already referred, that the offer to pay was accompanied with the condition that the release should be given. Mr. Richardson, who made the tender, was asked the following question: "Did you not say it was on condition of having that signed" (that is the discharge) "that you would pay the money?" His answer was: "I said upon condition of the mortgage being discharged I would pay the money." This placed the defendants in a position where they were obliged to refuse the money, because if they ac-

cepted it and executed the release, the whole matter would be closed whether the amount was correct or not. The case must therefore be treated as though no tender had been made. The general doctrine as to costs in cases of this kind is laid down in *Cotterell v. Stratton*, 8 Ch. Ap. 295. Lord Selborne there says: "The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the Court, which, in litigious causes, is generally not subject to review. The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. . . . These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract. . . . A decree, therefore, in a redemption suit, which disallows the costs of the mortgagee, is of right appealable, and if appealed against, can only be supported by proof of special circumstances sufficient to justify such a departure from the ordinary course of the Court. That there may be such circumstances is undeniable; the question is whether they exist in this case." In *Cliff v. Wadsworth*, 2 Y. & C., Chan. R. 598, the Vice-Chancellor says: "A mortgagor is entitled, like every other man, to be protected against litigious and unreasonable conduct." I shall as briefly as I can, give the facts and circumstances which have led me to make the order as to costs which I am about to pronounce. It appears from the evidence and what took place, that the defendant Mrs. McLeod was very anxious to obtain control of this property, and that it was to enable her to accomplish this object that she purchased this mortgage. She actually borrowed the money for the purpose, and according to her evidence she paid for expense in getting the assignment the sum of \$25. The purchase was certainly not made as an investment. The assignment was executed in Colorado on the 25th February, 1907, and it was registered on the 15th March, 1907. The plaintiff was in arrear in her payments; the last one, made shortly before

the assignment was made, only reduced the original loan by about \$100. Without notifying the plaintiff of the assignment, or making any application to her for payment or communicating to her in any way, the defendants caused a notice of sale to be published in the *St. Croix Courier* of the 21st of February, to take place on the 24th April, one month being the shortest time for a notice of sale required by the mortgage. So soon as the plaintiff learned of this she consulted with her solicitor, and she immediately set to work to ascertain the amount which the defendants claimed, so that it might be paid. Both the defendants and their solicitor after some delay, absolutely refused to give any information as to the amount of their claim, not only as to the amount unpaid for principal and interest, but also the amount claimed for expenses. The answer put in raises defences which no one attempted to support in addition to the one as to the rate of interest. Its unnecessary length, filled as it is by repetitions, long quotations and irrelevant matter, I hope the taxing master will not lose sight of in taxation. The defendants then filed long interrogatories for the plaintiff's examination. Her answer was not even read or used in any way. In order to avoid the expense of issuing a commission to Colorado to prove by Clark the payments which had been made to him, and about which there was really no dispute, and the evidence of which the defendant had seen and knew all about and had acted upon, the plaintiff gave notice to admit facts. The defendants refused to admit, and the commission was issued. Then shortly before the hearing the defendant who had already answered filed a disclaimer, and he now asks for his costs. There was in reality nothing to dispute about except the amount due, and this involved so little room for differences when once the rate of 8 per cent. was conceded, that five minutes conference should, and with reasonable men, would, have settled it. The defendants' actions throughout look like a deliberate attempt by accumulating costs, so to increase the burthen upon this plaintiff as to place the redemption of her property beyond her reach. If there had been a sufficient and unconditional tender the defendants would have been saddled with the costs of this litigation, and the money which has been paid into Court would have stopped the interest: *Robarts v. Jefferys*, 8 L. J. Chan. 137.

The bill will be dismissed against the defendant Hugh A. McLeod without costs. The defendant must pay the costs of the three overruled exceptions, and get the costs of the other. The defendant must also pay the costs of the plaintiff's answer to the defendants' interrogatories, and lose the costs of this hearing. The cost of the commission will be disposed of by the clerk. Otherwise she must have her general costs of suit. When taxed they will be added to the mortgage balance, and the money in Court, so far as it will go, will be used in payment and the balance as ascertained by the clerk will bear interest at the rate of 6 per cent. from 20th April, 1907, when the money was paid into Court for the defendants' protection and which she might have had at any time on application.

There will be the usual order as to redemption by payment of the balance.

DOMINION OF CANADA.

SUPREME COURT.

MAY 5TH, 1908.

THE KING v. ARMSTRONG.

*Government Railway—Injury to the Person—Negligence—
Section 20 (c) of the Exchequer Court Act, R. S. C. c.
140—Liability of Crown—Widow's Right of Action.*

Appeal from a judgment of the Exchequer Court of Canada.

THE CHIEF JUSTICE:—I am of opinion that this appeal should be dismissed with costs.

DAVIES, J.:—I agree in the conclusion as to the main facts reached by the trial Judge that Charland failed properly to set and lock the switch. I have gone carefully over the evidence and have reached the conclusion that the switch was not at the time in good working order. Had it been so, Charland's attempts effectively to set the switch would have been successful. He brought the crank to its proper place and set the safety hasp in its proper notch.

This was not done, as he says himself, without difficulty and trouble, a fact which Bruce's evidence fully supports. It seems reasonably certain, however, that while Charland was successful in putting the switch crank in place and setting the safety-hatch, such action which, in the case of the switch crank and attachments being in good working order, would have resulted in placing the switch-rails flush with the rails on the main line, did not do so. The switch-crank and the safety notch were set properly for the main line, and the target so indicated, but owing to some breakage or defect in the attachments, aggravated possibly by the snow which had fallen that morning to a depth of about three inches, I conclude from the evidence that the switch-rails did not move in unison with the crank and were not made flush either with the main line or the switch-line. I think the evidence of Bruce and Charland, the two men in the best position to judge, shews that the switch-crank appeared properly set for the main line, and that the target so indicated, but neither of them were able to say that they looked to see whether the switch-rails had swung so as to be flush with the main rails as, if the attachments had been in order, would have been the case. Bruce was too far away to see as to the rails being flush, and Charland, who was on the spot, says he did not look. Considering the trouble and difficulty he had in getting the switch-crank and the safety hasp in their places, I think it was negligence on his part not to have looked and seen whether the switch-rails had, after all his labour and efforts, swung to their proper place.

If the crank and safety hasp were set as he describes, and Bruce confirms, and the target indicated that the main line was open, no blame whatever could be attached to the deceased engineer for continuing on his course. Charland's evidence of the trouble he had with the switch lends great colour to the positive evidence of Bruce as to what he saw and the expert evidence of Houston as to how the accident occurred.

I think the evidence of Bruce, who was standing on the station platform looking at the approaching engine; of Mitchell, the conductor of the train, who saw the marks of the wheels on the ties, and of the expert witness Houston, the track master, prove that the accident started at the junction of the switch-rail with the main line rail, and not at the frog as submitted by the Crown. Bruce says he saw

the front wheels of the engine, at this point of the switch, mount the rails, which would not have taken place had the switch-rails been set true for the main line, although the indicator or switch-signal so pointed.

I conclude from the evidence of the conductor, Mitchell, that the engineer, Goddard, as he got up to the switch, observed that notwithstanding the target indicated the main line was open, the rails were not right, and that he immediately applied the brakes, which action might have had something to do in helping on but unfortunately did not prevent the accident, and, in any case, is not charged as negligence on his part.

In the result, my conclusion is that the accident was neither caused nor contributed to by any negligence of Goddard's, but that, as the evidence shews, the working parts of the switch must have been out of order before the accident, or were put out of order by Charland's working them at the time; that their defective working condition was probably contributed to by the fall of snow, that Charland managed, with effort and after trouble, to get the crank and safety hasp in their places, but was not successful in bringing the rails of the switch and main line together, and that this failure which he negligently left unobserved caused the accident, no negligence being attributable to the deceased engineer.

On all the legal points debated so fully at bar I am in agreement with the conclusion of the learned trial Judge. I think our previous decisions have settled, as far as we are concerned, the construction of the clause (c) of the 16th section of the "Exchequer Court Act," and determined that it not only gave jurisdiction to the Exchequer Court, but imposed a liability upon the Crown which did not previously exist, and also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed, and that the case at bar is within the provision of the above cited amendment.

I also agree on the authority of *Miller v. The Grand Trunk Railway Co.*, [1906] A. C. 187, which, in my opinion, governs this case, that the defence raised by the Crown of the deceased having obtained satisfaction or indemnity within the meaning of article 1056 of the Civil Code by reason of the annual contribution made by the Intercolonial

Railway Employees' Relief and Insurance Association, Class C., cannot be sustained.

I also concur with the trial Judge that our decisions are binding upon us to the effect that the doctrine of contributory negligence (so called) only applies in the Province of Quebec to the mitigation of the damages which would otherwise be recovered by the injured party, and does not operate to defeat his action.

The appeal should be dismissed with costs.

IDINGTON, J.:—I cannot find as a fact that the deceased engine-driver so neglected his duty as to render his conduct contributory to his own death.

The application of the emergency brakes indicates he saw what, if he had seen sooner, might have averted the accident.

I cannot, however, say upon the whole evidence that his failure to see sooner was the result of negligence.

As to the other questions raised we are bound as to some of them, I think, by decisions here, and, as to others, by the decisions in the Privy Council, and cannot interfere.

The appeal as a result fails and should be dismissed with costs.

MACLENNAN, J.:—I agree in the opinion of Mr. Justice Davies.

DUFF, J.:—The contentions advanced by the appellant are, with the exception of one which I am about to discuss, fully dealt with by the learned trial Judge, and, as I entirely agree with his reasoning and his conclusions, it is not necessary that I should, save as to that exception, say anything further about them.

A contention not referred to by the learned Judge and apparently but little discussed at the trial, was pressed upon us, viz., that the negligence of the deceased, Holsey Cleveland Goddard, is an answer to the action. That contention necessarily, in the circumstances, proceeds upon the proposition that a person situated as Goddard was, and observing the rules, must have seen that the switch was set for the siding.

There seem to be insuperable obstacles in the way of giving effect to that contention at this stage. The evidence, for example, of the witness Bruce, put forward by the

Crown as a substantial part of the defence, was to the effect that the witness observed the signal at the switch immediately before the approach of Goddard's train, and that it appeared to be set for the main line. In view of that evidence it is quite impossible to say that the implied finding of the learned trial Judge on this point is a finding so clearly erroneous as to justify the reversal of it.

Appeal dismissed with costs.

E. L. Newcombe, solicitor for the appellant.

Laflamme and Mitchell, solicitors for the respondent.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 7TH, 1908.

PAYSON v. EQUITY FIRE INS. CO.

Insurance—Fire Policy—Loss—Appraisement—Submission to Arbitration—Waiver by Company of Defence—Condition—Premises left Vacant for over Thirty Days—Sufficiency of Proofs of Loss—Verdict of Jury Set aside.

Action for a loss on a fire policy tried before Mr. Justice Landry and a jury at last Carleton circuit. Verdict for plaintiff.

Pursuant to leave reserved motion was made in Michaelmas term last to set aside this verdict for the plaintiff and enter a verdict for the defendant or for a new trial.

F. B. Carvell, K.C., for plaintiff.

H. A. Powell, K.C., for defendant.

The following judgments were now delivered:—

LANDRY, J., (dissenting):—The facts of this case are sufficiently detailed in the judgment which the Court delivered by my brother McLeod, to make it unnecessary for me to repeat them.

Section 168 of c. 203 Revised Statutes of Ontario 1897, sets forth in full, conditions of an insurance contract, and makes those conditions binding on the insurer, and further enacts that "no stipulation to the contrary, or pro-

viding for any variation, addition, or omission, shall be binding on the insured, unless evidenced in the manner prescribed by ss. 169 and 170." The contract entered into in this case is the statutory conditions embodied in that section 168, and which conditions are all written in the body of the policy, and some variations and additions endorsed on the policy, in accordance with ss. 169 and 170. A question was discussed as to whether the laws of Ontario should control in the interpretation of this contract. I believe the contracting parties intended such to be the case, and so contracted. Sections 169 and 170 read in part—such facts as are material to this case—as follows:—

169. "If the insurer desires to vary the said conditions or to omit any of them, or to add new conditions, there shall be added on the instrument of contract containing the printed statutory conditions, words to the following effect, printed in conspicuous type and in ink of a different colour:—

VARIATIONS IN CONDITIONS.

"This policy is issued on the above statutory conditions with the following variations and additions:

"These variations (or as the case may be), are by virtue of the Ontario Statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company. 60 V. c. 36-169.

"170. No such variation, addition or omission, shall, unless the same is distinctly indicated and set forth, in the manner or to the effect aforesaid, be legal and binding on the assured; and no question shall be considered as to whether any such variation, addition or omission is under the circumstances, just and reasonable, but on the contrary, the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid."

The variations and additions endorsed on the policy were in my opinion, made a part of the contract, but subject entirely to such interpretation, and having only such effect, as would be given them by that c. 203.

For a better understanding of the questions involved in this case, it is perhaps necessary to repeat here in part, the

3rd statutory condition found in the body of the policy, its variation as found endorsed on the policy and the 27th new condition also endorsed.

Third statutory condition in body of policy: "Any change material to the risk . . . shall avoid the policy . . . unless the change is promptly notified, etc." . . .

Third statutory condition varied by indorsement: "Any change of occupancy or non-occupancy shall be deemed a change material to the risk."

Twenty-seventh new condition endorsed: "If any building herein described become vacant or unoccupied and so remains for the space of 30 days, etc., this policy shall be void."

It seems clearly established by these citations that the contract between the parties on the question involved was before the endorsed variations and addition, that: "Any change material to the risk, etc., shall avoid the policy, s.-s. 3 of s. 168; and that materiality was a question of fact for the jury (s.-s. 3 of s. 144, c. 203)."

The 3rd condition, however, is varied by an endorsement on the back of the policy to read that the change complained of in this case will be material to the risk, thus taking the question of materiality out of the hands of the jury, and declaring it by the contract to exist. Left in that way, no doubt would seem to be entertained that the parties contracted that if the insured premises become vacant for the space of 30 days the policy would become void. But the other endorsement on the policy, "these variations are," etc., in force "so far as by the Judge they shall be held to be just and reasonable to be exacted by the company," leaves it to the trial Judge to first pronounce on the reasonableness and justice of the variations and addition. Should he decide that the variation and addition are just and reasonable in this case, the jury would not have to pronounce on the materiality of the change, because the parties contracted that such change would be material. Should the Judge declare the variations and addition not reasonable and not just, then the materiality of the change relied on by the defendant to annul the policy must be left to the jury. Under the above cited stipulation endorsed on the policy, I become charged with the duty of saying whether this variation and addition are reasonable and just. I had some doubts then, but a closer study of the case has removed these doubts as to the reasonableness

and justice of the variation and addition. For the purposes of the case at nisi prius I decided that they were not reasonable and just; that decision left the contract exactly as if the variation and addition had not been endorsed, and by virtue of s.-s. 3 of s. 144 cited above, the materiality of the change had to be pronounced by the jury. If I was wrong in my finding that the variation and addition were not reasonable and just, then I agree that the verdict should be for the defendant.

Let me analyse some of the reasons that led me to give the decision I did. The house insured became unoccupied and remained unoccupied for some months. Then it became again occupied, and it was during the last occupancy that the fire occurred. No proof was given that the building so occupied when the fire took place, had, by reason of its having been for a time vacant, become a greater risk at the time the loss occurred. If it is permissible to look to the conditions existing when the fire occurred, and not to be entirely guided by those existing when the contract was entered into, it is easily determined that the company were not at all prejudiced by the unoccupancy of the building. Therefore a condition exacted on the part of the company which in no way prejudicially affected their rights or in no way prejudiced them, seems to me to be an unjust and unreasonable condition; particularly would it be so when express legislation agreed by the contract as controlling this point, existed to the effect that the materiality of the changed condition was to be left to the decision of a jury. It does not seem reasonable that a company which is bound by statute, or which makes itself bound by contracting in the terms of a statute, to leave certain matters of fact to a jury, should exact a condition taking the determination of that fact from the jury on the happening of an event that in reality creates no prejudice to them whatever. It was just to prevent such an injustice that the Ontario statute was passed in that respect. And it is a fair assumption that it was for the same purpose that the contracting parties embodied in that respect the statutory conditions in this contract. The statute says in effect: The materiality of changed conditions will be a question for the jury, and if the insurer wants to vary the enactment that variation can only be effectual in case the Judge says it is a reasonable and just variation. Can a Judge say reasonably that it is under such circumstances reasonable and just for

the insurer to change the statutory conditions by having it declared as part of the contract that his responsibility will cease on the happening of an event which in no way prejudices him. Now what is the Judge to consider to arrive at a conclusion as to the justness and reasonableness of the conditions? Section 170 of the Ontario Act, speaking of the consideration to be given, says: "No question shall be considered as to whether such variation, addition or omission is under the circumstances just and reasonable." It does not say "was." If it had been intended to be confined to the time of entering into the contract the word "was" would be much more clear and applicable. Besides we read in the statute and contract: ". . . they shall be held to be just and reasonable" . . . If intended to be confined to the time of making the contract, these words would be more apropos; . . . they shall be held to have been just and reasonable. Then, again, I am not prepared to acquiesce fully in the finding that even looking at the conditions as they existed when the contract was entered into, the varied condition and addition were reasonable and just. As the true interpretation of the meaning of a contract is the correct definition to be given to the intentions of the contracting parties, so should the same considerations be the guide for saying whether the variation and the addition are reasonable. There can be no doubt, I presume, that the intention of the parties in subscribing to the indorsements on the policy was to relieve the company from liability in case a fire occurred while the premises were unoccupied. Any other intention or view implies unreasonableness. If that was the intention why give a different effect to the contract than that intended? If it was the intention—and if it was not the intention the condition becomes unreasonable and unjust—then a finding is not free from doubt which establishes this doctrine: that because the defendants may reasonably ask to be relieved of responsibility in case the risk should increase it becomes reasonable and just that they should stipulate a ceasing of their liability under circumstances when the risk was not increased. The statute was intended to prevent companies interposing unfair, unjust and unreasonable conditions to which they could technically but with safety appeal to defeat a suit when the true reasons for defending could not with equal safety be resorted to. In this case the defence was only resorted to as a safe technicality, other motives

existing for refusing to pay. I am convinced that the addition and variation are unjust to the assured who paid his premium for an existing risk and who was not to be protected against the same risk during the time for which he insured. A reasonable and just stipulation under ordinary conditions might be to contract that if the insured premises burned or be damaged by fire during a period of inoccupancy, the insurer would not be responsible for the loss, but to contract that a vacancy, whether it imposes greater risk or not, will relieve the insurer from responsibility is, in my opinion, unreasonable, unjust and unfair. Having declared the conditions and variation that govern this present case unjust and unreasonable, and the jury having answered in effect that the risk when the fire occurred was no greater than when assumed, I think the rule to set aside the verdict should be refused.

MCLEOD, J.:—This action was brought on a policy of insurance issued by the defendant company, insuring a dwelling-house owned by the plaintiff, situated in the town of Woodstock, for the sum of one thousand dollars. At the trial, which was before Mr. Justice Landry and a jury, a verdict was entered for the plaintiff on answers to questions submitted to the jury by the learned Judge.

The policy was issued by the defendant company on the 31st of July, 1906, and by it the defendant company insured the plaintiff's building for one year from the 28th day of July, 1906. The building was injured by fire on the night of the 9th of December, 1906. The policy was issued on a written application made by the plaintiff. So far as I can gather from the record nothing turns on the application. A day or two after the fire Mr. Fairweather, an Insurance Adjuster of St. John, who was then in Woodstock, was requested by the general agent of the company in St. John, to adjust the loss. After some discussion by the parties it was agreed in writing, signed by the plaintiff, and by Mr. Fairweather on the part of the company, to submit the question of damages to arbitrators. By that writing it was also agreed that the assessment of damages should be no waiver by the company of any defence they might have to the loss itself. In addition to that, by Condition 16, which is endorsed on the back of the policy, it is provided that in no case shall the fact of arranging for or joining in any arrangement for appraisal prejudice or affect the

liability of the company. The appraisalment, therefore, does not preclude the company from raising any objection it might have as to its liability for the loss. The only effect of the appraisalment is to fix the amount of damage that had been done to the building by the fire.

One of the conditions in the policy requires that immediate notice of the happening of the fire should be given in writing to the company. This notice was not given, but at the trial the company, I think, waived that condition; at all events it was not urged before us.

The defendant company did not pay the loss as appraised and it does not appear by the evidence that any reason was given to the plaintiff for the non-payment. The plaintiff on the 12th of January, 1907, served proofs of loss on the agent of the defendant company, and as the company did not pay, this action is brought. Although there are a number of pleas pleaded by the defendant company, the defence, I think, rests on practically two questions.

The first is: Were the proofs of loss that were served sufficient under the policy to entitle the plaintiff to recover?

The second is: Was the policy voided by the fact that the building had become vacant and remained vacant for more than thirty days during the currency of the policy?

The head office of the company is in Toronto, and although it does not appear to have been actually proved, it may be taken for granted that the defendant company is a company incorporated in the province of Ontario. By Chapter 203 of the Revised Statutes of 1897 of that province it is provided that every policy issued in that province shall be subject to certain statutory conditions and provisions and that those conditions and provisions shall be printed in the policy with the heading "Statutory Conditions." See Cap. 203. Revised Statutes of Ontario, 1897, sec. 168. Section 169 of the same statute provides that if the insurer desires to vary any of the said conditions, or omit any of them, or add new conditions, they shall be added on the instrument of contract containing the printed statutory conditions and printed in a conspicuous type and in ink of a different color. In this policy these statutory conditions are printed, and on the back of the policy are printed in red ink some variations of the conditions and some new conditions which are added. The defendant company have a general agent residing in St. John, N. B., and what I suppose may be called a sub-agent who resides in Woodstock.

Some question arose and was discussed at the argument, as to where this contract was made. The application for the insurance was made to the agent in Woodstock, N.B., in writing; the property insured was situated in Woodstock and the plaintiff resided there. The policy was delivered to the plaintiff in Woodstock and the premium paid there. I think under the evidence the contract was made in Woodstock, New Brunswick.

There was a very considerable discussion as to whether this contract should be governed by the law of Ontario or by the law of New Brunswick. I presume it is meant whether it should be entirely controlled by the Ontario statute. From my view of the case I think that that question is not material; the policy itself shews what the contract is and these statutory conditions, as they are called in the policy and the variations in conditions and new conditions added, taken altogether, make a contract that the parties entered into, and it is for this Court to determine what that contract is, and in the determination or construction to be put upon a contract I know of no difference between the law of Ontario and the law of this province.

One further word as to the variations in conditions and the new conditions added. The last clause printed in red ink on the back of the policy is as follows:—"These variations and additions are by virtue of the Ontario statute in that behalf in force so far as by the Court or Judge before whom a question tried relating thereto they shall be held to be just and reasonable to be exacted by the company." It was contended by counsel on behalf of the company that that did not form part of the contract, that it could only relate to property situated in Ontario and was simply in the nature of a notice. I think that it does form part of the contract, that the parties themselves have agreed that these variations and new conditions are in force so far as the Court or Judge before whom the question is tried may determine them to be just and reasonable to be exacted by the company. So that in that view it seems to me we eliminate entirely any question that may arise as to whether it shall be construed as though the contract was made in Ontario or not. The whole instrument is a contract entered into between the parties in the province of New Brunswick and must be construed by our Courts by the law governing the construction of contracts. Although a number of pleas were pleaded the defence really rests on the two grounds I have stated which are raised by

the pleadings. As to the proofs of loss—in the first instance there can be no doubt that serving proofs of loss is a condition precedent to the right to recover. I am, however, in this case, disposed to think that the proofs as served were a substantial compliance with the terms of the policy, that is, that they may fairly be taken to mean that the fire originated from the chimney. However, as I have come to the conclusion that the policy was really rendered void before the happening of the fire in consequence of a breach of two of the conditions of the policy, I need not discuss that question.

The conditions I refer to are the third statutory condition as varied on the back of the policy, and the twenty-seventh condition, which is a new condition endorsed on the back of the policy.

The third statutory condition is as follows: "Any change material to the risk and within the control or knowledge of the assured shall void the policy as to the part affected thereby unless the change is promptly notified to the company or its local agent, and the company when so notified, may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium which the assured shall, if he desires the continuing of the policy, forthwith pay to the company, and if he neglects to make such payment forthwith after receiving such demand the policy shall no longer be in force." On the back of the policy it is varied by striking out the words "company or its local agent" in the second line, and substituting therefor the words "manager of the company," and any change of occupancy or non-occupancy shall be deemed a change material to the risk. The condition as varied, therefore, reads as follows:—"Any change material to the risk and within the control or knowledge of the assured shall void the policy as to the part affected thereby, unless the change is promptly notified in writing to the manager of the company, and any change of occupancy or non-occupancy shall be deemed a change material to the risk, and the company, when notified, may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium which the assured shall, if he desire the continuance of the policy, forthwith pay to the company, and if he neglects to make such payment forthwith, after receiving such demand, the policy shall no longer be in force."

The house was in fact vacant for nearly three months, that is from some time in August until about the 19th of

November, and no notice was given to the manager of the company, and indeed no notice was given to anybody. The learned Judge held that whether the change was material to the risk or not was a question for the jury, and the first two questions submitted were as to the materiality of the change. They are as follows:—

1. Was the changed occupancy of this building, causing the building to be vacant for upwards of thirty days, material to the risk in this case? A. No.

2. Is such a change as applies to this building from an occupied building to its becoming vacant for upwards of thirty days material to the risk generally? A. Yes.

It will be noticed that the questions refer to the building being vacant for thirty days. It does not, under this condition, require that the building should be vacant for thirty days to void the policy. Any vacancy would void the policy unless notice was given. I do not mean to say that it would apply to a mere change of tenants, as where one tenant moves out and another moves in there must be time to make the change, as one of this character would not be a vacancy, but where the tenant moves out and there is no other tenant to come in the building is vacant and it matters not if it is only five or ten days, if it is within the knowledge of the insured he must, under the condition, give notice to the company and then the company can decide whether it will cancel the policy or continue it. In this case the building was vacant for nearly three months.

With great deference to the learned Judge, I am obliged to differ from him as to the materiality being a fact for the jury to determine. It was not a question for the jury, and these questions and answers can have no bearing upon the case. It is a part of the condition, a part of the contract, that the change of occupancy or non-occupancy shall be a change material to the risk, and no jury or Court can alter the condition made or the contract entered into by the parties themselves; the Court can only construe the contract itself.

The parties had a right to agree between themselves what should be material to the risk and what should void the contract. They did agree in their contract that any change material to the risk should void the policy, and they also agreed that a change of occupancy or non-occupancy should be material to the risk. It was also agreed that the company, when notified of the change, might do one of two things, it might

cancel the policy and return the premium for the unexpired period, or it might demand an additional premium, and if the assured did not pay that premium the policy would no longer be in force. I will later discuss as to whether the condition was just and reasonable to be exacted, but, leaving that out for the time, we must ascertain just what this condition means. Looking at it as varied the meaning is plain and clear; any change material to the risk voids the policy unless notice is given. The variation which is read as part of the condition says that occupancy and non-occupancy shall be material to the risk. When this change, therefore, did take place, and no notice of it is given, the policy became void. It did not remain in force for any purpose whatever, and whether the vacancy was material to the risk or not was not at all a question for the jury.

Glen v. Lewis, 8 Ex. 607, was an action brought on a fire policy. The case turned on what was the proper construction to be given to the first and fourth conditions in the policy. The first plea shortly stated was, that persons making insurance were required to give accurate description of the buildings, etc., etc., and if the buildings insured, or containing property insured, or containing any steam engine, stove, etc., must be noticed and allowed on the policy, and if an omission or misrepresentation took place in any of the foregoing, or any other material point, the policy was void and the insurance of no effect. The fourth condition, which was the most applicable to the defendant's case, was as follows: "In case of any alteration being made in the building insured, or containing any property insured, or of any steam engine, stove, kiln, furnace, oven or any other description of fire heat being introduced, or of any trade, business, process or operation being carried on, or goods deposited therein, not comprised in the original insurance or allowed by endorsement thereon, or the making of any communication from one building to another, notice thereof must be given; and every such alteration must be allowed by indorsement on the policy, and any further premium which the alteration may occasion must be paid; and unless such notice be duly given, such premium paid, and such indorsement made, no benefit will arise to the insured in case of loss."

The defendant pleaded a breach of both of these conditions. The breach of the fourth condition was that a steam engine not comprised in the original policy was introduced in the building containing the stock and property so

insured and no notice was given the company. At the trial before Pollock, C.B., it appeared that the plaintiff after the insurance was effected, entered into an agreement to purchase a small steam engine provided it would answer his purpose to turn a lathe. A furnace and boiler were erected and the engine attached, and on one occasion a fire was lighted and the engine set to work, but it was found wholly unfit for the purpose for which the plaintiff required it. A few days afterwards a fire broke out in the plaintiff's premises and his stock was destroyed. It does not appear that the fire was caused by the introduction of the engine, indeed I would gather from the case it was not. The defendant contended that plaintiff could not recover as no notice had been given of the use of the steam engine. The plaintiff contended that as the engine was used by way of experiment no notice was required. The Judge told the jury that if they were of opinion that the use of the steam engine was simply temporary and by way of experiment the policy was not affected by it. A verdict was found for the plaintiff and leave was reserved to the defendant to move to enter a verdict for him. No question was raised or left to the jury as to whether this change was material or not. The case then came before the Exchequer Court and a verdict was entered for the defendant. Parke, B., in giving the judgment of the Court at page 615, says: "The question turns entirely on the meaning of the first and fourth conditions of insurance endorsed on the policy, which are made the subject of the first, second, third and fourth pleas in this action; and the point to be decided is, whether the placing a small steam engine on the premises, with a boiler attached, and using it in a heated state, for the purpose of turning a lathe not in the course of the plaintiff's business as a cabinet maker, but for the purpose of ascertaining, by experiment, whether it was worth his while to buy it, to be used in that business, avoids the policy under either of those conditions. It appears to have been on the premises insured for several days, and then the fire happened, whether in consequence of the engine having been worked or not is quite immaterial." And after further discussing the case, he held that there was a breach of the condition and that therefore the plaintiff could not recover. I refer to this case thus at length because it shews that where a policy contains a condition that on the happening of certain things

the policy is void unless notice is given to the company, if any of these things do happen and no notice is given the policy is void, and also that if the fire happens after this breach of the condition it is quite immaterial whether it happened in consequence of the condition having been broken or not. Leake on Contracts, (5th ed.), at page 275 in speaking of contracts of fire insurance, says:—

“But it is usually made an express condition of the policy that if any alteration be made by which the risk is increased, or any other kind of alteration, the same must be notified to and allowed by the insurer, otherwise the policy will be void; in which case any alteration of the kind stipulated, and not duly notified and allowed, would avoid the policy, whether in the event it caused the loss or not; and any implied condition respecting alteration is excluded by the express terms.” In the present case it is quite immaterial—following the reasoning of Parke, B., in *Glen v. Lewis*—that the fire did not occur in consequence of the vacancy or during the vacancy. It did occur after the vacancy. The condition is that a change of occupancy or non-occupancy is material to the risk and that if it occurred the policy would be void unless notice was given the company, in which case the company could either cancel the policy or demand an additional premium, therefore, by the terms of the condition the policy became void. There was no provision that it should remain in abeyance during the vacancy and then revive and attach to the premises when the building was again occupied.

As to the condition being material, when it is contained in the contract, and is a part of the contract of insurance, I refer to *Thompson v. Weems*, 9 App. Cas. 671. This was on a life policy, it is true, but I see no difference in the construction to be put on a condition in a life policy and a fire policy. In that case it was claimed that the answer to one of the questions in the declaration made by Weems when the contract of insurance was entered into was false and therefore the policy was void. It was a condition precedent, but in dealing with it as to whether it is material or not there can be no difference between a condition precedent and a condition subsequent. The Court held that this condition was a part of the contract and Lord Blackburn, at page 683, says: “It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of any-

thing a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material." This, I think, applies with equal force to a condition subsequent and to the two conditions in this policy that are referred to. See also *Anderson v. Fitzgerald*, 4 H. L. Cas. 484.

The 27th condition in the policy, which is one of the new conditions endorsed on the back of the policy, is as follows: "If any building herein described become vacant or unoccupied, and so remain for the space of thirty days, or being a manufactory shall cease to be operated for that length of time, this policy shall be void."

All that I have said with reference to the third statutory condition as varied applies to this condition, but I think with greater force the only fact to be found under this condition is whether the building was vacant for thirty days. If it was, then the policy became void without any action on the part of the company.

The building was in fact vacant for nearly three months. This condition although a new condition endorsed on the policy, was a part of the contract between the parties and both are bound by it. And when the building had been vacant for thirty days, the policy, by the terms of the condition, came to an end. When a condition is thus made in a policy of insurance that on the happening of a certain thing the policy itself shall become void, I know of no rule of law that will prevent the policy from becoming void on the happening of that thing and the contract thus coming to an end.

Under the terms of this policy, however, this Court has to decide whether this variation of the third statutory condition and this new condition are just and reasonable to be exacted by the company.

As to whether this variation and this new condition are just and reasonable the first question is when the justness and reasonableness is to be tested. The Courts of Ontario hold that it must be tested at the time the policy is issued. See *Ballagh v. Royal Mutual Fire Ins. Co.*, 5 Ont. App. 87, judgment of Patterson, J., at p. 105; *Smith v. City of London Ins. Co.*, 14 Ont. App. 328; *May v. Stan-*

dard Fire Ins. Co., 30 U. C. C. P. 51; McKay v. Norwich Union Ins. Co., 27 O. R. 251. In this last case, heard before Armour, C.J., and Street, J., at p. 261, Street, who delivered the judgment of the Court, says: "After some difference of opinion it appears to be now settled that the reasonableness of a variation from the statutory conditions is to be tested with relation to the circumstances at the time the policy is issued—and not in the light of those existing at the time at which the condition is sought to be applied." I think that is the correct view, and it must it seems to me be especially true on conditions such as these. It is a matter I think of general knowledge that insurance companies do not care to insure vacant buildings. Similar conditions are in use in a great many, possibly nearly all the policies issued. It is in evidence that the risk is very much increased by vacancy. The time the policy was issued was the time the company had to determine whether or not it should exact these variations and new conditions. The risk and the rate of premium was based on the condition that the building should not become vacant during the currency of the policy and the third statutory condition provides that if it does become vacant and the insurer gives notice the company may either cancel the policy or demand a higher rate of premium. It cannot be said the variations and new conditions in a policy such as this are just and reasonable at one time during the currency of the policy and unjust and unreasonable at another. The true rule is the rule laid down by the Ontario Courts, that is, that the reasonableness of the variations and the new conditions must be tested with relation to the circumstances at the time the policy is issued. Then we are to determine whether these variations and new conditions are just and reasonable to be exacted by the company. I understand the view of the learned Judge to have been that if the fire had occurred during the vacancy they would have been just and reasonable, but as it occurred after the vacancy, and when the building was occupied, they were not just and reasonable. I cannot concur in that view as I have already said the test as to their justness and reasonableness must be applied at the time the policy was issued. It is a matter of common knowledge that insurance companies regard vacant buildings a greater risk than buildings that are occupied, and Mr. Fairweather, an insurance adjuster, who has been in the business for 15 or 20 years, in his evidence says that com-

panies do not care to insure unoccupied buildings, he considers there is an increased risk and he says in answer to the question, "after a building is insured as a dwelling-house, occupied as a dwelling-house at the time of the insurance, in your judgment would the risk be increased if the building were vacated?"—"Yes, it would." Can it be said then that it was either unjust or unreasonable that the company should by these conditions protect itself against this increased risk, the premium itself being based on the fact that the buildings were occupied? I think not. I think the variation to the third statutory condition and the 27th condition, endorsed on the back of the policy, are both just and reasonable. The variation in the third condition is that the occupancy or non-occupancy shall be material to the risk, and seeing that companies do not care to insure unoccupied buildings, as there is an increased risk, I think there is nothing unreasonable or unjust in exacting that condition. The 27th new condition on the back of the policy is simply a plain protection against the building being allowed to become vacant and remain vacant for 30 days.

In *Eckardt & Co. v. The Lancashire Ins. Co.*, 31 S. C. R. 72, the insurance clause printed as a variation from the statutory conditions in a policy of insurance against fire required the insured in consideration of a reduced premium to keep the property covered by other policies to at least 75 per cent. of its value, and it was held not to be unjust or unreasonable. Mr. Justice Gwynne, in giving the judgment of the Court at p. 74, says: "The clause objected to has been in use in fire insurance companies in several countries on the continent of Europe, in England and in the United States for upwards of fifty years and is daily coming more into use, and we can see no substantial reason or suggestion why it should be pronounced to be unjust or unreasonable. There is no foundation for the contention that every variation from a statutory condition or addition thereto should be, *prima facie*, held to be unjust and unreasonable." These words I think apply to the present case. It is a matter of common knowledge that nearly all insurance companies have conditions similar to these, and it is in evidence that an unoccupied building is a greater risk than an occupied one.

It seems to have been conceded that if the fire had occurred during the time the building was vacant the de-

fendant company would not have been liable. If the defendant company would not be liable for a loss occurring during the time the building was vacant, it would be because, first, that the variations and new conditions were just and reasonable, and second, that on the breach of the third condition as varied or the new condition, the policy was void.

But if a contract of insurance or any other contract becomes void because of the breach of conditions or of any one condition, the contract is at an end. In this case the breach of the third condition as varied occurred when there was a vacancy of the building, and no notice was given to the company, and as to the 27th condition which was endorsed on the back of the policy when the building was vacant for thirty days, a breach of either of these conditions voided the policy: both conditions were broken and the policy became void and the contract came to an end. It would require a new contract to make the defendant company liable. The rule should be made absolute to enter a verdict for the defendant.

BARKER, C.J., and HANINGTON, J., agreed with McLEOD, J.

DOMINION OF CANADA.

SUPREME COURT.

MAY 5TH, 1908.

MEIGHEN v. PACAUD.

Way—Private Lane—Easement—Right to Erect Fire Escape.

Appeal from the judgment of the Court of King's Bench (Appeal Side) for the province of Quebec (reported 4 E. L. R. 228), confirming the judgment at the trial of Dunlop, J., (reported 3 E. L. R. 20).

THE CHIEF JUSTICE:—I am of opinion that this appeal should be dismissed with costs.

IDINGTON, J.:—I think that the instrument to be interpreted, when read in light of the surrounding facts and circumstances attendant upon its execution, does not pro-

vide merely for a passage-way over the land in question, but for the more extended use of that space implied in such uses as were then being made of the same by other owners of adjoining properties claiming in the same right, and to become users in common with the respondent.

The primary use intended no doubt was to be that of a passage-way, and anything clearly inconsistent with that possibly might be complained of.

The case launched, however, was neither confined to nor substantially founded upon such a complaint.

The contention here seems an extreme assertion of a naked right of property the maintenance of which might injure others and do the appellant no good, if my interpretation of the instrument is correct.

The language used is not that usually employed for a mere right of passage-way.

I think the appeal should be dismissed with costs.

MACLENNAN, J.:—I would allow this appeal for the reasons given by Mr. Justice Bosse in the Court of King's Bench, to which I may be allowed to add some further reasons.

A lane is a way, a strip of land used for passage to and fro. It may be private, but it is usually owned by one person, who, or some antecedent owner, has given the right to use it to one or more other persons. That is the present case. One Laurie subdivided a nearly square piece of land fronting on St. Catherine street, Montreal, into twenty-three building lots; with a lane eighteen feet wide, running across the centre, from Mountain street to Drummond street, and he or his representatives sold a number of these lots, extending from St. Catherine street to the said lane in rear, to the respondent. In the deed the north-west boundary of the land so sold is described as a common lane, and the interest in the lane which is conveyed is described thus:—

“With the use in common with others, of the said lane in rear.”

It is plain, therefore, that the result of the conveyance was that the vendor remained owner of the lane and the purchasers became entitled to use it in common with others, that is, to use it as a way.

Whatever right the respondent acquired was fixed once for all at the date of his deed. He has acquired no further right since.

Now I will suppose that at the time the vendor still owned, and retained for his own use, some of the land on the other side of the lane, opposite to that of the respondent. Can it be doubted that he could build upon that land, excavating vaults and cellars and extending them beneath the lane to its full width? Or that he could project the upper stories of his buildings across the lane, for its full width, at a sufficient height, not to interfere with the use of the lane as a way?

It seems to me that there can be no doubt that he could do so. And, if he could, he could sell and dispose of those rights to any other person.

If that is so, it follows that, by the creation of his fire escape, the respondent has been guilty of a trespass and an illegal invasion of the appellant's property, and an unauthorized use of the lane otherwise than as a way.

DAVIES, J.:—The controversy between the parties to this appeal is as to the proper construction to be placed upon the clause of the defendant's deed, which says that it was: "The intention of the vendors to sell the land as therein described with the use in common with others of the said lane in rear."

The premises are situated in the heart of the city of Montreal.

The appellant, who, after the respondent had purchased his lane, became the owner of the lane in question, of course, to whatever rights the respondent and others had obtained over it by their deeds, claimed that such rights were simply rights of way, and that the attaching by the respondent to his house of a fire-escape which for its width extended over the lane, was in excess of his rights and in violation of the appellant's.

The Courts below held that the respondent's rights were not limited to mere rights of way over the lane, embracing access to and from his house, but that they included a reasonable use of the lane, as such, for all proper purposes not inconsistent with the common use of others entitled to use the lane or with the appellant's ownership of the soil. They held that the construction of the fire-escape complained of, in compliance and accordance with the municipal regulations, was such a reasonable use.

I agree that, looking at the situation of the land and of the buildings of the parties with relation to the lane

and the ordinary streets of the city, this construction is a correct one. I do not think a construction which gave the respondent a mere right of way in and over the lane for the purpose of obtaining light and air for his house, the rear of which faced on the lane, would be a reasonable construction. As pointed out, such limited construction involved the right of the owner of the soil to build up the lane and exclude light and air from the windows of all the houses facing on it, provided a sufficient right of way was left over the soil. I cannot agree that this is a reasonable construction of the deed.

The common user by others entitled to use the lane is the test with which to measure the respondent's rights in the lane. Any user inconsistent with that common user would be illegal, as would also any interference with the rights retained by the owner of the soil of the lane. It was not a question in this case as to the manner of the construction of the fire-escape or whether his rights entitled him to put any fire-escape at all where he did. As far as the evidence goes, it seems to have been constructed in accordance with the municipal regulations, and the right to construct it does seem to me to be a not unreasonable use of the lane and not necessarily to interfere with the common use of the lane by others entitled to such common use.

I agree that the appeal should be dismissed with costs.

DUFF, J.:—I concur in the opinion stated by Mr. Justice Davies.

QUEBEC.

COURT OF REVIEW.

MAY 21ST, 1908.

Coram,—TELLIER, PAGNUELO, and ARCHIBALD, J.J.

ELECTRIC FIREPROOFING COMPANY v. THE ELECTRIC FIREPROOFING COMPANY OF CANADA, LIMITED; AND EADAM.

Patent of Invention — Fireproofing Device—Process—Assignment—Principal and Agent—Validity of Patents—Warranty.

In review of the judgment of the Superior Court, Montreal, ARCHIBALD, J.

There are two cases between these parties, but we shall only speak of one, namely, the one in which the Electric Fireproofing Company, which may be called the New York Company, is plaintiff, and The Electric Fireproofing Company of Canada, which may be called the Canadian company, is defendant.

The conclusions arrived at in this case necessarily govern the other case.

The New York company were the owners of two patents of invention—one, covering a new composition of matter for fireproofing wood or cloth fabrics; and the other, a process patent for the application of the fireproofing material to wood. These patents in 1899 had been granted in several countries, all of which were held by the New York company, which company was then actually putting in practice the United States' patents in New York. The patents bought, as to description of claims, were similar in the several countries, and more particularly the Canada patents were identical with the United States patents.

It seems that a firm of Stillman & Hall, of New York, chemists, had been called upon by English clients to report upon the composition patent, above mentioned, with the object, on behalf of such clients, of purchasing the European patents therefor. The English patents had been previously sold for a considerable price. Stillman & Hall, upon making this investigation, became impressed with the value of the patented composition, and began negotiations with the New York company, for the purchase of the Canadian patents. These negotiations had been proceeding for some months, and on December 5th 1899, Stillman & Hall wrote the New York company in part as follows: "New York, December 5th, 1899. Dear Sirs,—Regarding the patents of your company, already granted you, to manufacture and sell an unflammable wood in the Dominion of Canada, we will beg leave to refer you to the correspondence covering this subject, and to call your special attention to your letters to us, bearing date of October 23rd and 24th, and November 6th, 11th, 15th, 1899. According to our understanding and agreements expressed in these several letters, we accept your proposition, covering the purchase of the patents granted to and owned by your company, to manufacture and sell unflammable wood in the Dominion of Canada, namely:

"First. Canada Patent, No. 46781, issued to Max. Bachart, August 8th, 1894.

"Second. Canada Patent, No. 63671, issued to Bachart & O'Neil, August 25th, 1899.

"Fourth. The privilege to sell uninflamable wood treated by any Canadian company, to be organized hereafter to operate the electric fireproofing process, working in Canada, under the name of Fireproofing Company patents, for the production of uninflamable wood. . . .

Eighth. In consideration of the above, we hereby bind ourselves to pay as follows:—

"The sum of \$25,000 in cash by January 10th, 1900; and \$75,000 in first mortgage bonds, in the Electric Fireproofing Co., upon the completion of the Canadian works, said works to be completed by August 1st, 1900; the said bonds to bear interest at the rate of 5 per cent. per annum, and to mature in five years or before that time, at the option of the Canadian company, and the said bonds to be a first mortgage lien upon all the properties, plant and patents of the company, and no other bonds to be issued.

"Tenth. The above is contingent upon the patents being found to be in a satisfactory condition."

Previous to these letters, both verbally and by other letters, Stillman & Hall had considerable negotiations with the New York Company, and, as a matter of fact, had commenced the formation of a company to put in practice said patents in Canada, to be called the Canadian company, although the Canada company was not yet completely organized. The Canada company, was, in fact, incorporated the 4th of July, 1900. The New York company executed a formal assignment of the patents to Stillman & Hall, the consideration being the same as that expressed in the letter of Stillman & Hall, to the New York company of date 5th December, 1899.

"On the 21st of September, 1900, at a meeting of the Canadian company, it was resolved that whereas the Electric Fireproofing Company of Canada is desirous of securing the rights owned by this company (Stillman & Hall) for Canada, that the secretary-treasurer be authorized to make, execute and deliver, on behalf of the company, an agreement therefor, in the form hereafter set forth." Then follows the agreement, in which Messrs. Stillman & Hall are set up as parties of the first part, and the Canadian company are set up as parties of the second part, and then comes the following contract, in part:

"1st. That the said vendor hath, and it doth hereby transfer, assign and make over to the said company, the Canadian letters patent of invention, Nos. 46781 and 63671, etc.;

"2nd. That the said vendor doth hereby bind and oblige itself to erect and fully equip, at its own expense, a manufactory and plant, for the purpose of carrying out the process covered by the said letters patent, similar to, and of the same capacity as the plant now in operation in New York.

"4th. That whereas said company has heretofore paid the sum of \$25,000 in cash to Stillman & Hall, for the purpose of securing the rights hereinafter set forth, now, therefore, in further consideration of the present contract, sale and assignment, the further sum of \$225,000, which the said company hereby binds and obligates itself to pay to the said vendor, as follows to wit:

"(a) The further sum of \$75,000 which shall be payable as the construction and equipment of the factory, etc., progresses, and the final payment thereof shall become due within thirty days after the completion and acceptance of the said factory and equipment by the said company;

"(b) 750 fully paid, unassessable shares in the capital stock of said company, of the par value of \$100 each, aggregating in all the sum of \$75,000;

"(c) 75 bonds of the said company for \$1,000 each, amounting in all to \$75,000, secured by hypothec upon the lands, buildings, plant and machinery of the said company, bearing interest at the rate of five per cent. per annum, payable semi-annually."

The bonds in question were issued by the Canadian company, and were delivered by it to Stillman & Hall, and were, by Stillman & Hall, delivered to the New York company, as well as the \$25,000 paid in cash, in accordance with the contract between the New York company and Stillman & Hall.

The present action is brought by the New York company, holder of the bonds in question, against the Canadian company, for the interest on these bonds, overdue at the date of action, less, however, a certain amount of open account upon business transactions between the parties. The overdue interest on the bonds amounted to \$9,325; the deduction by credit of balance of account due by the New York company to the Canadian company leaves the exact amount due by consent of parties at the sum

of \$4,217.67, for which amount, it is admitted, judgment must go, unless the plea of the Canadian company be maintained.

The Canadian company contends that Stillman & Hall, in dealing with the patents in question, were the agents of the New York company; they thereupon contend that the Canadian patents were null and void and were not the subject of any valid letters patent, and that the alleged inventions were not new or patentable.

Particulars were demanded by plaintiff from defendants of the ground upon which they based their allegation of want of invention and want of novelty in the patents in question, and the Court ordered such particulars. Under said judgment, the defendant contended that the Canadian patent No. 46781 was anticipated by a number of British and United States patents:

Plaintiff answered defendant's plea by setting up:

First. The absence of any *lien de droït* between the plaintiff and the defendant concerning the validity of the patents.

Secondly. By setting up that the sale and transfer of the patents in question did not carry with them any warranty of the validity of the patents, and were not made with any express warranty, and also that the patents in question were, as a matter of fact, good and valid, and had been used by the defendant for several years without any objection, and without infringement or interference of any other party.

The judgment of the Court below has set aside the contention of the plaintiff relating to the absence of *lien de droït*, and has omitted to deal with the contention of the plaintiff as to the question of a warranty, or validity arising out of the transfer of a patent, but has maintained the plaintiff's position on the merits, holding the patents transferred good and valid.

The defendant inscribed in review.

The two first questions which the plaintiff raises appear to me to be of much importance. I have already pretty thoroughly indicated the course of the negotiations between the New York company and Stillman & Hall.

The transfer of the patents in question by the plaintiff to Stillman & Hall, was made in New York, and the effect of that transfer would naturally, by the application of the principle *lex loci contractus*, be determined by the law of the State of New York. Unless it can be ascer-

tained from the proof in this cause that Messrs. Stillman & Hall acted as agents of the plaintiff, in their dealing with the defendant, in connection with the transfer of these patents, it seems difficult to say how there can be a *lien de droit* between the plaintiff and the defendant on the question of validity of the patents. The proof leaves no doubt that, when Stillman & Hall began negotiating with the plaintiff for the purchase of these patents, plaintiff did expect that Stillman & Hall would interest a Canadian company in the work of putting these patents into practice. That appears, manifestly, from the fact that the plaintiff agreed to accept the bonds of such a company to a certain amount in part payment of the price of the patents. At the time, however, when these patents were actually transferred by the plaintiff to Stillman & Hall, such a company had not yet been incorporated; only, Stillman & Hall, by undertaking to give plaintiff \$75,000 in bonds of such a company, necessarily undertook to cause such a company to be incorporated, and to issue bonds. How could Stillman & Hall be agents of an unexisting principal?

There is, in my judgment, nothing whatever in the record to show that in January, 1900, when these patents were actually transferred by the plaintiff to Stillman & Hall, the property in them did not absolutely pass to Stillman & Hall, leaving them free to sell these patents to a Canadian company, for any price which they might see fit, provided only they paid to the plaintiff the price stipulated. The whole of the negotiations by the Canadian company, for these patents, was made with Stillman & Hall; the payment was made to Stillman & Hall, and not only so, but in the contract, by which the right to the patents was transferred by Stillman & Hall to the defendants, it was also contracted by Stillman & Hall that they should construct a factory for the defendants and equip it for the purpose of putting these patents in practice; the whole for a single sum without any distinction being made as to how much represented the patents and how much represented the erection and equipment of the factory. It is a general principle in the interpretation of contracts, that *pourparlers* whether verbal or in writing, which antedate the contracts are to be considered as set aside and waived, in so far as they may differ from the contract finally passed, that is to say, that the parties are to be presumed to have put their final agreement into the contracts which they actually execute.

In the present instance, it is plain that, although there have been communications between the members of the Canadian company and the members of the New York company, not in my judgment, by any means, involving the conclusion that the new York company was dealing directly with the Canadian company, yet all of these things preceded the actual contract, and in the absence of legal and sufficient proof of simulation, these actual contracts must be held to govern the rights and obligations of the parties.

I am therefore of opinion that the Canadian company must answer on its bonds towards the holder of these, the New York company, and cannot raise as an issue, a plea by which it attempts to escape from its obligations on its bonds, by reason of contracts alleged to have been with the New York company, but proved to have been with Messrs. Stillman & Hall.

As to the second question, upon which the judgment omitted to pronounce, it is, I think, also useful to make some remarks.

The defendant has cited the following judgments in our own Courts, which appear to be the only ones which bring up the question as to whether the transfer of letters patent of invention carries with it a warranty of the novelty and the utility of such letters patent. There is a case in 11 Q. L. R., at p. 24, Dery et al. v. Hamel. Ramsay, J., in this case said. "La seconde question a rapport à la vente du droit de faire usage de l'invention. Les appelants prétendent qu'il n'existe aucune garantie, et que la seule garantie accordée par la loi est l'existence de la patente. Je ne vois pas que l'on puisse citer aucune autorité à l'appui de cette prétention et il ne s'est jamais présenté de cas identique à celui-ci. Evidemment ce n'est pas une vente aleatoire comme celle d'un coup de filet comme on l'a suggéré. Mais il n'est pas nécessaire de discuter cette question plus au fond, car l'acte de vente consenti, par les appelants à l'intimé, contient une description qui équivaut à une garantie et que comporte chaque patente, c'est-à-dire que l'invention est nouvelle et utile. Il serait étrange, en effet, si ce qui ne peut exister qu'en autant que c'est nouveau et utile pourrait être acheté et vendu comme tel, tout en n'étant ni l'un ni l'autre. La vente du droit de patente tombe spécialement sous l'article 1522 du Code Civil (vices cachées.)"

On the 26th page, Judge Tessier discusses the matter and shews that the pretended patent was impossible of

application, and that the sale of it was pure fraud. The next case cited by the defendant is that of *Perrault v. Normandin*, in the 31st Legal News, p. 118. This was a sale, not of a patent of invention, but of a pretended secret for the manufacture of ginger beer, and it turned out that it was no secret at all, that everybody knew about it and the purchaser was subjected to opposition, so as to render the alleged secret absolutely useless.

The other case cited by the defendant is *Almour v. Cable*, and was an action on a promissory note given as the consideration of an alleged patent right. It was stated in the plea that the pretended patent was nothing else than a *contre-façon* of a patent previously obtained in the United States and Canada, by one Ingraham, and which patent was being put in practice in Canada.

The Superior Court rejected the plea, but in appeal, that part of the plea which concerned the nullity of the patent as *contre-façon* of another invention, was maintained, and the action was dismissed.

All of these cases raise other questions than the mere question of law as to warranty of novelty and utility arising out of the fact of transfer. The question of fraud entered into all of them, the question of express warranty entered into one of them, and in one of them there was no patent transferred at all.

The principle upon which these judgments appear to have been founded, is that, in the first place, the public consideration for the grant of an exclusive right to manufacture a certain article, is that the article must be new and useful, that is to say, that any person who demands an exclusive right must give the consideration therefor, that is, either by his labor, by his thought, by his genius, he has found out something which was not known before and which is useful, from which the public will benefit at the conclusion of the term of his patent; and there is no doubt that when, upon an action taken to annul a patent, it is proved that the alleged invention was not new or was not useful, the Court would set aside the patent as wholly null, and it would be considered as if it had never existed.

Now we, especially in the provinces governed by a system of law which is derived from the Roman law, are possibly more bound by conclusions drawn from general principles, than those accustomed to laws derived from England. Thus we have in article 1472 of our Code the definition of a sale, as follows:

"La vente est un contrat par lequel une personne donne une chose à une autre, moyennant un prix en argent que la dernière s'oblige de payer." Thus there must be a thing sold.

But if the patent be a pure nullity, what is sold? There is no object of sale, and therefore there can be no sale, and no obligation to pay a price.

This view of the matter also prevails in France, and for the same reason. But there exists there a considerable and growing weight of opinion in a contrary sense.

His Lordship here reads Pouillet, *Brevets d'Invention*, 4th edition, pp. 246, 247, 250; and Allart, cited by Pouillet at p. 234.

It appears to me to be still open to consider, under the circumstances I have above set forth, whether under our patent law, as it exists, and having in view the transfer of the patents in question in this cause, which on their face purport to transfer "all the right, title and interest" of the transferor of the patents in question, to the transferee, whether such a transfer carries with it a warranty of the indefeasibility of the patent?

Our patent law was derived from the English patent law, and, in the absence of any other means of interpretation and application, great weight has to be given to the jurisprudence upon a like law in England.

I may say also that the patent laws of the United States are in all respects similar, and the jurisprudence, at any rate, so far as regards this particular question, is in the United States identical with that of England.

I cite Frost's "Patent Laws and Practice," 2nd edition, p. 357, as follows: "In cases arising from the breach of contract of purchase of letters patent, it is always most important to consider whether the contract contains any express or implied warranty, on the part of the assignor, as to the validity of the patent; for if there is no such warranty, the purchaser, in the absence of fraud, cannot repudiate the contract, on the ground that he has subsequently discovered the patent to be void. A purchaser, without a warranty from the assignor, in the absence of fraud, is bound to take the patent with all its faults, if it have any."

(See case of *Hall v. Condor*, 2 C. B. N. S. 22, and *Smith & Neale*, 2 C. B. N. S. 67). On p. 358, the author speaking of the case of *Hall v. Condor*, says: The Court of Common

Pleas held "that in the absence of any allegation of fraud, it must be assumed that the plaintiff was an inventor, and there was no warranty, express or implied, either that he was the true and first inventor, or that the invention was useful or new; but that the contract was for the sale of the patent such as it was, each party having equal means of ascertaining its value, and each acting on his own judgment."

In *Wallace & Williamson on Patents*, p. 329, the author says: "The Courts will not read into an assignment of a patent any implied warranty by the assignor that the letters patent assigned are valid. . . . They (that is the assignor and the assignee) had the same means of enquiring into the fact, and of learning whether it had been in use, or the invention had previously been known in England. Why, therefore, should we assume that the plaintiff meant to assert that the patent was indefeasible, and that the defendants purchased on that understanding, rather than that, each knowing what the invention was, and having equal means of ascertaining its value, they contracted for the patent, such as it was, each acting on his own judgment?"

There can be no doubt that that is the English law and jurisprudence upon that question, and indeed the Courts in England have gone so far as, even in the case of express warranty of the validity of the patent, to give the assignee only such relief as should compensate him for the damage suffered by reason of breach of warranty of the patent.

As I have said, the American law is the same. I cite *Walker on Patents*, Nos. 283 and 284: "No warranty of validity is implied in any assignment of any patent right. If the assignor knows the patent to be invalid at the time he makes the assignment, he is guilty of fraud, and the assignee may have relief against him on that ground; but if both parties are equally innocent of knowledge, the loss consequent on invalidity afterwards brought to light, must fall upon the owners of the patent."

It is, however, not necessary to cite further authority upon that point. The same doctrine has been applied in the Province of Ontario, under our own patent law.

In the case of *Vermily v. Cannaff*, 12 O. R. 164, Judge Boyd said: "In the absence of fraud or warranty or representation, which induced the bargain and falsified the result, such contract was the purchase of an interest in an existing

patent. There was no implication as to the patent being made indefeasible."

I am, therefore, of opinion that the transfer of the patents in question from the New York company to Messrs. Stillman & Hall, in New York, and which purported to transfer only the right, title, and interest of the assignor to the assignee, did not carry with it any warranty of the validity of the patent. Even supposing it should be implied that, under our law, such a warranty would be implied to defendant company, the plaintiff has the right to be judged upon that question by the law of the place where they made the transfer, namely, the United States; and there can, I think, be no doubt that by that law there is no warranty of validity. This furnishes a strong reason why the plaintiff company may decline to discuss the validity of those patents with the defendant company with whom they did not directly deal, and thus force is added to the contention that, with respect to that matter, there is no *lien de droit* between plaintiff and defendant.

We come now to the question upon which the case was decided by the Superior Court, namely:

Are the patents valid?

The consideration of this question is to be commenced with a threefold presumption in favor of validity;

In the first place, the granting of the patents themselves presume validity;

In the second place, the undoubted success of the patents in practical operation, as proved in the cause, is a presumption of validity; and

In the third place, the judgment rendered in the cause, founded upon the proof, is a further presumption of validity.

It may be generally said that apart from former defects, the validity of a patent depends upon its novelty, its utility and the presence of actual invention. In the present case, the question of utility may be left out of consideration, because the proof shows beyond all contradiction the successful operation of the patents.

Speaking then of want of novelty, that may depend upon two things: 1st, that the invention was previously known to the public; and 2nd, that it had been anticipated by previous patents.

In the United States and in Canada, but especially in the former a very complete search is made as to the

patentability of any alleged invention for which a patent is asked. See *Ridout on Patents*, at p. 46, where he says:—

“In the United States, there is a very strict examination as to the novelty of the alleged invention, with appeal from the decision of the primary examiners, from the decision of the Board to the Commissioner of Patents, and, from his decision to the Supreme Court of the District of Columbia.”

In Canada there is a preliminary examination as to novelty. See s. 8 of the Patent Act Amendment, 1892.

In Canada and the United States the production of the letters patent in Court is *prima facie* evidence of novelty. It may be remarked that the patents in issue in this case are identical with the patents issued in the United States, and have been subjected to the very complete examination required in that country, before issuance. This, however, is only a presumption, and the Court is not precluded from declaring a patent void upon satisfactory proof of want of novelty.

Speaking first of what I shall call the composition patent, which consists of a mixture of two salts of ammonia, it is contended by the defendant that the substance is not a new composition of matter within the meaning of the Patent Act; that it is merely the mixing of two substances of which the particles come in juxtaposition to each other, but which do not combine nor form any new substance. It was indeed very warmly argued on behalf of the defendant that such a composition was not patentable.

It seems to me, however, that the position is not maintained by jurisprudence. It may very well be admitted that, if two substances be mixed together for the performance of some particular function, each one of them, previously known as being adapted for the performance of that function, and that when put into action each one of them performs its own proper function, that the mixture does not meet the requirements of the Patent Act with regard to composition of matter. But where the two elements produce together a result which would not be produced by either of them, acting alone, and which result is useful, then the mixture is patentable, although the union of the two substances may be only mechanical.

With regard to the patent under consideration, doubtless the properties of both substances used as a fire preventer, were well known before the issue of the patent. Thus in a work published in Paris, as long ago as 1821, entitled,

"*Annale de Chimie et de Physique*," we find the substances which enter into the composition of the article patented in this cause, described as proper substances for the prevention of fire; also in a patent granted to Robert R. Graf, on September 16th, 1890, in the United States, we have the following described as the invention: "A fireproof composition consisting of sulphate of ammonia, phosphate of ammonia, salt ammoniac, lime, sodium, tungstate and water, in about the proportion herein specified. That patent comes nearer to the patent in this cause than anything else which is brought up against it. Both of the substances which form the patented article in this case are also found in the earlier patents, but they are in the latter associated with three other substances.

In Frost, Patent Laws, 2nd edition, p. 35, I find the following: "Invention again may sometimes consist in the selection of particular members of a class of substances which possess properties by means of which the inventor is to produce a result which is new and useful, or, if old, is attached in a better and more economical way than hitherto. So, though a class of bodies may have been employed before for a particular purpose, there may be sufficient invention in selecting one member of the class which possesses particular advantages not shared by other members of the class to support a patent for the use of that particular member."

In the present instance, the result of the use of the two substances selected appear, by the evidence and by actual demonstration made in the presence of the Court to be useful. The use of either of the substances alone, for the saturation of a fabric and the subsequent application of heat, as, for example, in the process of ironing, cause considerable discolouration of the fabric, whereas the use of the patented substance in the same manner did not produce discolouration. So that the evidence seems to leave no doubt that the patent is sustainable under the authorities which I have just cited. See 8 R. P. C. 389; 12 R. P. C. 470, 13, 429; 14 R. P. C. 403.

The demand for some invention which should render fabrics non-inflammable has been for a long time partially at least unsatisfied. When, therefore, an article suddenly sprung into existence which met the demand, and came into general use, it is easy to conclude that some invention must have been necessary to procure that article, even although, after the article is once procured, it may appear

the most obvious thing in the world. Under such circumstances, then, the amount of invention requisite to form a foundation for a valid patent may be very small. Even in cases where the idea upon which the invention rests is purely accidental, it may form ground for a valid patent.

With regard to the process patent in question in this case, the attack made upon it is that it has been anticipated by various other patents previously granted. The object of the process patent in question in this case was to saturate wood of various kinds with a solution intended to render the wood non-inflammable, and in a manner so as not to injure the strength or fibre of the wood. The wood especially intended to be treated under the process was wood intended for interior house purposes, and therefore wood which required to be capable of being polished. The previous process for wood saturation had been, it may be said, entirely applied to wood intended to be used in rough and exposed places, such, for example for railway ties or telegraph posts, and the object of this saturation was principally to secure the wood from rotting. The application therefore of the present patent was widely different from that of the earlier patents. It may be said, speaking generally, that the adaptation of an old process or combination, used in connection with some particular function, in not again patentable for use in connection with an analogous function, where no invention is required to be made to make the combination applicable to the new function.

In the present instance, however, it is proved that the previous patents for the saturation of wood involved the use of high temperature in the process, and that the effect of this high temperature on the wood treated was to injure its fibre and render it incapable of taking a polished surface.

The principal difference between the patent now under consideration and those which previously existed is that it is dependent upon low temperature in the performance of the saturation and drying processes, and that it provides an element in the combination for the purpose of securing the low temperature required. It is clearly proved that this low temperature is essential for the new use to which the process was to be put, and it has been frequently held that a valid patent may be based upon changes of temperature, where such produce results either wholly new or more beneficial than those which had been previously obtained.

I think, on the whole, that the evidence clearly demonstrates the patentability of the invention in this case, and, indeed the evidence given by the defence is, properly interpreted, wholly consistent with the validity of the patents. These patents were used by the defendant for several years. Defendant was not troubled by any infringer, and it was only when, probably in consequence of insufficient capital or imprudent management, the defendants' business had proved unsuccessful, that an effort was made to avoid the payment of the stipulated price of the patent rights.

I am fully convinced that the judgment, which has maintained the plaintiff's action is well founded and should be confirmed.

Judgment unanimously confirmed, with slight modification of amount owing to clerical error in judgment of the Superior Court.

DOMINION OF CANADA.

EXCHEQUER COURT, QUEBEC ADMIRALTY DISTRICT.

MAY 22ND, 1908.

THE SHIP HAVANA v. THE SHIP PRESCOTT.

Admiralty Law—Shipping—Collision—Reasonable Care and Skill—Damages.

DUNLOP, J.:—It is admitted that George B. Taylor is the owner of the steamer Havana, and that the steamer Prescott is owned by the Richelieu & Ontario Navigation Company. The facts under which the accident in question occurred, and by reason of which damages were caused, are clear, and they can be disposed of in a few words. On the evening of the 2nd July, 1907, the plaintiff's ship, the Havana, on her way from the city of Quebec to Erie in the State of Pennsylvania, came to the down-stream entrance of the Lachine canal. The wind at that time was from the north or northwest, a light breeze, the weather was clear and fine, it being still daylight. It was the intention of the Havana to take the lower or south lock, lock No. 1. The Havana approached the entrance to that lock, ran alongside of the northwest wall of the south lock and put two of her

crew ashore to manage the lines in locking the Havana in conformity with the canal regulations. When the Havana was alongside of the north wing wall, the authorities in charge of the lock notified her that she could not pass through the lock until the passenger steamer that was coming up astern had passed through; in other words, that the steamer Prescott should take precedence; and the Prescott thereupon pushed her way through, and became jammed between the Havana and the lock for a short time, and then hurried into the lock. She went through the south lock No. 1, struck the upper gates, broke them, and was carried swiftly back by the rush of the water, and in doing so came into collision with the Havana, and damaged her to such an extent that she had to be beached in order to save her.

The Havana, after receiving the orders from the canal authorities that the Prescott was to have precedence, backed up towards the south side of the entrance to the lock, as far as was necessary to allow the Prescott to pass in ahead of her, and while she was lying on the south side of the entrance, her bow was slightly in front of a pinflat, loaded with a deck load of timber, that was moored to the south wall, near the downstream end.

After the Prescott had passed the Havana, the Havana worked her way slowly across the entrance to the lock in order to make fast to the north wing wall, until the Prescott had been locked through. This she did because it was evidently considered by those in charge of her that that was the only place at the entrance of the lock free and clear and available for that purpose; but before this manœuvre could be carried out, the collision took place, and the Havana was seriously damaged.

The substantial defence of the defendant to this case is that the accident was inevitable owing to the breaking of the spring of the bell in the engine room of the Prescott, and subsidiarily that if the Havana had been carefully and skilfully navigated by those in charge of her at the time, the accident and collision could have been avoided.

The learned Judge then went thoroughly into the question of inevitable accident, and then continued:—

Defendant's counsel contends that the breaking of the spring of the hammer on the Prescott was caused by a latent defect, without antecedent negligence, and that the collision which followed was inevitable.

In order to assist me in arriving at a decision in this case, I have availed myself of the power which this Court

has to refer to some gentleman conversant with nautical affairs. I have obtained the assistance of Capt. James J. Riley, a mariner of experience, holding a certificate of competency as master from the British Board of Trade, number 82599, now engaged in important public service as superintendent of pilots and examiner of masters and mates, and a director of the nautical college, upon whose judgment and opinion I shall find it my duty to rely, and to whom I have submitted the following questions, and whose answers are appended thereto:—

Q. 1.—Do you consider that under the facts of this case as proved, the steamer Prescott was properly manned, equipped and navigated, and that a proper lookout was kept, and that all possible precautions were taken by its master and crew to avoid the collision with the Havana, which took place as has been proved at the time and place in the pleadings in this cause mentioned? If not, state in what particulars the manning, equipment, navigation and lookout of the Prescott were faulty, and what precautions should have been taken to avoid the collision in question, that were not taken?

A.—In my opinion the Prescott was at fault in the following particulars: She was not properly equipped. There was no arrangement to repeat back the signals from the engine room to the wheel-house. There was no proper officer in charge of the vessel. The master was at supper when the collision took place. The mate, whose duty it was to take the Prescott through the canal, was on the main deck, a place from which, after he had ordered the men to go on deck with the ropes, he could not take any part with the management of the vessel while she was going through the canal. Ouelette, the Rapids pilot, was pilot of the vessel from Cornwall to Montreal, and assumed full charge of the vessel from Victoria pier up to the time of the collision. In my opinion, he navigated the vessel improperly. He was proceeding too fast when he entered the canal, and approached and entered lock No. 1 too fast, without having any lines ashore. When about 50 feet inside of the lock, a line was got ashore, but the one man of the crew who jumped ashore did not put the line over the snubbing post until the vessel was about the middle of the lock, and it could not be made fast on board the vessel, as she was going too fast. There was no proper lookout.

I am further of opinion that the collision could have been avoided if reasonable skill and care had been exercised

by the officers and crew of the Prescott up to the time of the collision.

Q. 2.—Do you consider that under the facts of this case as proved, the steamer Havana was properly manned, equipped and navigated, and that a proper lookout was kept, and that all possible precautions were taken by her master and crew to avoid the collision which took place as has been proved, with the Prescott, at the time and place in the pleadings in this cause mentioned. If not, state in what particulars the manning, equipment and navigation of the Havana were faulty, and what precautions should have been taken to avoid the collision in question that were not taken?

A.—With respect to the Havana, the evidence shews that she approached the lock in a proper manner. The mate was on the forecastle head, on the lookout, and two men were put ashore to handle the lines on the north wing wall of the approach to the lower gates. She gave the right-of-way to the Prescott as ordered by the lockman. After she was released from the jam, caused by the Prescott forcing past her, she proceeded to retake her position alongside of the north wing wall of the approach to the canal, which was the only thing she could do owing to local conditions and canal regulations.

I am of opinion that the Havana was properly manned, equipped, and navigated, and that everything that was possible was done by those in charge of her to avoid the collision, and to get out of the way of the Prescott, and that all reasonable skill and care were exercised by those in charge of the Havana at the time of the collision.

I concur in the foregoing opinion of the assessor.

The learned Judge then considered the evidence at considerable length, and concluded:—

I have cited at considerable length many of the more important decisions and authorities on the question of inevitable accident. The spirit of the jurisprudence seems to me to be this: that if at a critical moment in the agony of a collision, or immediately before it takes place, a vital or material part of the machinery or of the steering gear or equipment of a vessel fails or breaks and cannot possibly be remedied, and the command of the movement of the vessel by those in charge of her is lost and cannot be regained, and a collision then occurs without any antecedent negligence on the part of the disabled ship, and unavoidable as far as she is concerned, the accident is inevitable. But if, as in the present case, a bell spring

breaks, a mere accessory of the equipment of the vessel, and the command of the vessel is not necessarily thereby lost by those in charge of her, and antecedent fault on her part is proved, this cannot be deemed to be an inevitable accident.

There was no need for the pilot, Ouelette, running about the deck as he did. A prompt verbal order given by him at once without leaving his post could have been immediately transmitted to the engineer, and the accident could have been avoided, and was in no sense inevitable. This order might have been transmitted through the speaking tube, if it had been in order, which it was proved it was not. There was no reason why the ship should have been in extremis, as admitted by one of the learned counsel for the defendant, if he had kept his place and acted promptly. Had he done so the collision, in my opinion, could have been avoided.

Having carefully considered all the authorities and the evidence of record, and the advice given me by the nautical assessor, which I accept and in which I concur, I am of opinion that the collision in question could have been avoided if reasonable care and skill had been exercised by the master, officers and crew of the ship Prescott, and that the defendant, the ship Prescott, and her owners, the Richelieu & Ontario Navigation Company, are solely responsible for all damages caused by and resulting from the collision in question.

I, consequently, find and pronounce in favour of the plaintiff, as owner of the ship Havana, and maintain plaintiff's claim and action, with costs; and do further order and adjudge that an account be taken; and refer the same to the deputy registrar, assisted by merchants, to report the amount due; and order that all accounts and vouchers, with the report in support thereof, be filed within six months.

I am much indebted to the counsel for the numerous authorities cited, and for their able arguments in this case, and to the nautical assessor for his valuable assistance in this important case, wherein plaintiff claims \$25,000 for damages in the collision in question, this being the amount endorsed on the writ in this cause issued.

QUEBEC.

COURT OF REVIEW.

MAY 13TH, 1908.

WARE v. DOMINION EXPRESS COMPANY.

Coram, TELLIER, PAGNUELO, and LYNCH, JJ.

*Negligence—Damages—Injury to Child—Action by Parent
—Independent Contractor.*

In review of the judgment of the Superior Court, Montreal, 7th June, 1907. Plaintiff sued to recover \$5,000, alleging that he is tutor to his minor child, and that on the 28th June, 1905, his minor child, aged 5 years, while playing in the lane in the rear of plaintiff's house fell into an excavation by the side of a well which had been made by the defendant for the purpose of erecting a stable, and which excavation was not properly protected to secure the safety of children and others in passing in the said lane, and that plaintiff's child was seriously injured and disfigured. The defendant pleaded by traversing the declaration and by specially alleging that the work in question had been committed by it to an independent contractor not under the defendant's control, and that by law the defendant was not responsible for the accident in question. The Superior Court found in favour of plaintiff and allowed him \$100, finding, as to the question of fact, that the excavation made in the lane outside of the wall in course of construction for the defendant was not sufficiently protected to secure the safety of children passing in the lane, and, moreover, that the excavation in question had been allowed to remain for a period much longer than necessary. On the question of law, the lower Court found that, although a proprietor is not responsible for accidents which may be caused by the negligence of contractors whom he employs to do specific work for a fixed price where the proprietor does not preserve to himself a control over the manner of performance of the contractor's work, still, it appears in the present case, that the defendant did employ a contractor named Allan for the purpose of performing the work in question, but in the contract with Allan the defendant reserved the control through an architect appointed by it over the works in question, including the works necessary for the protection of the public from danger. The Court, therefore, held that the rule of non-respon-

sibility for the acts of the contractor towards the public does not apply and that the defendant was responsible towards the plaintiff. The Superior Court also considered under all the circumstances and the condition of life of the plaintiff, that the plaintiff was not guilty of fault in allowing his child to play in the lane.

LYNCH, J.:—There are two issues in this case: one of fact, the other of law. The only evidence concerning the way the boy fell in is given by the little boy himself, a little playmate and the little boy's grandmother. The evidence of the two little boys is to the effect that the injured lad fell into the hole while he was running past it along the lane. But the evidence of the boy's grandmother is to the effect that she saw her grandson standing upon the wall in course of construction, and, just immediately after she had turned away, she heard a cry that a little boy had fallen off a wall and had been killed. The wall in question was on the opposite side of the lane. Therefore, there is a manifest contradiction as to the facts on the part of plaintiff's witnesses, and on this ground alone I am of the opinion to reverse. But there remains an important point—namely, the responsibility of a proprietor for the fault of his contractor. Was the contractor acting under the direction of the defendant at the time of the accident? Had the architect, employed by and representing the defendant, such control over and upon the work of the contractor as to make the latter subordinate to the architect? Is the contractor so subordinate to the architect that an accident due to the fault of the contractor can be fastened upon the proprietor? These are some of the questions raised in the present case. The wording of the contract certainly relieves the proprietor from all liability for any damages which the contractor might occasion. The architect had complete direction of the building operations, but he was concerned merely with the results of the work and not with the means whereby those results were obtained. The contractor, Allan, states that he had the supervision and control of the men and that he paid them. In my opinion, the defendant exercised no control whatever over the work. On this point also, I would reverse the judgment and dismiss plaintiff's action, with costs in both Courts.

TELLIER, J.:—The *Journal du Palais* of 1848 lays down the rule that a proprietor is not responsible for damages in-

curred during the erection of his building when he employs an architect. But under article 1684, C.N., Fuzier-Herman reports a great number of decisions which show that since the Code Napoleon the former jurisprudence has been abandoned. Therefore, the employment of an architect does not relieve the proprietor from responsibility for accidents happening on the work. And in the present case the contract sets forth that everything shall be done to the satisfaction of the defendant's agent—the architect in question. On the question of fact, the child could not have fallen into the hole if it was properly protected. But it was possible for the child to fall into the hole from a place where it had no right to be, namely, on the wall. The judgment must be reversed.

PAGNUELO, J.:—The architect is there for the purpose of supervising the carrying out of the plant; he has no control over the workmen nor over the way in which the work is done. The decisions in France are not binding upon us. They are written wisdom and are only useful to us when they guide us to the interpretation of our laws according to our ideas of justice and in conformity with the spirit of our laws. I am of opinion to reverse the judgment.

QUEBEC.

COURT OF REVIEW.

MAY 13TH, 1908.

CALVE v. NORTHERN INDUSTRIAL COMPANY.

Coram, TELLIER, PAGNUELO, and ARCHIBALD, JJ.

Negligence—Injury to Workman—Pure Accident.

In review of the judgment of the Superior Court, St. Scholastique, Robidoux, J., dismissing the action. Plaintiff was engaged in cutting in half a log of green cedar, about 5 feet long, by means of a circular saw, on a sawing table, when the log slipped or shifted and plaintiff's left hand came into contact with the saw and he lost his thumb and first finger. The allegations of fault were: That the sawing table was unsteady, that there was not room enough to saw a log five feet long across in its middle and that the saw wobbled. The defendant denied the allegations of the declaration. The Superior Court found none of the allegations of fault proved, and, in the absence of any fault, decided that it was a pure

accident for which the defendant could not be held responsible.

TELLIER, J.:—The sawing table and saw were in good condition. Green cedar, split with an axe, is a tortuous and twisted piece of wood and it is difficult to handle; but the plaintiff was an experienced man, and while he necessarily had to weigh somewhat heavily on the log to hold it steady while he was cutting it, still it was the usual way to do it and plaintiff had had eight years' experience in saw mills. The downward motion of the saw would help to steady the log and press it more firmly on the table. But in any event the plaintiff might have lessened the chances of the log slipping by laying it with the bark side down instead of placing the smooth and slippery side on the table. The accident was inherent to a dangerous work and was liable to happen at any time. To have asked plaintiff to stand at the side of the saw, instead of in front of it (as was suggested), would have exposed him to being injured by splinters. There being no fault on defendant's part, plaintiff's action was properly dismissed. Judgment confirmed by the majority of this Court with costs.

PAGNUELO, J., dissented, and was of the opinion that the sawing table was not in good condition, that it was unsteady and added to the already sufficiently difficult nature of plaintiff's task of cutting across a length of twisted green cedar log. His Lordship was also of opinion that there was not sufficient space to permit of the sawing across of a log of about five feet in length. His Lordship added that a case of this nature showed the absolute necessity in this province of a law to compensate workmen in cases of accident in industrial employments.

QUEBEC.

COURT OF REVIEW.

MAY 14TH, 1908.

MONTREAL CANADA FIRE INSURANCE CO. v.
RICHMOND.

Coram, TELLIER, PAGNUELO, and ARCHIBALD, JJ.

Contract—Principal and Agent—Cancellation—Damages.

The defendants, by their inscription, ask for the revision of a judgment of the Superior Court, rendered at Montreal

by Mr. Justice Loranger, 16th December, 1907, which maintained the action of the company plaintiff and declared that the contract between the parties of the 15th April, 1905, had been cancelled at the instance of the company plaintiff on the 30th September, 1906, and condemned defendants to render an account to plaintiff of their administration under the said contract, and to pay plaintiff \$14,042.91.

PAGNUELO, J.:—The contract between the parties appointed defendants as chief agents of plaintiff for Ontario, and the contract contained a certain clause under which either party might cancel the same by giving three months' notice in writing to that effect to the other party, in virtue of which the plaintiff, on or about the 28th of June, 1906, gave to the defendants notice of cancellation to take effect on the 30th September, 1906, and in accordance with the notice the contract was cancelled on that date. The plaintiff sues to recover the books, and for an accounting. The defendants admit the contract and the notice, but allege that the contract was made for three years at least, and for an indefinite period thereafter, and could not be cancelled by either party until after the expiration of three years at least, and that accordingly the attempted cancellation is illegal. Defendants further allege that they have returned the books, without prejudice, that there are no balances due plaintiff and that an action of damages has been instituted by them against plaintiff for the illegal cancellation of the contract. The resolution of the directors appointing the defendants as agents is as follows: "That the proposed contract for general agents of Ontario to Richmond & Templeton be for a term indefinite, with a stipulation that each party may, nevertheless, put an end to it by means of a notice in writing given to that end to the other party at least three months in advance." The contract embodying the resolution was subsequently signed by the parties. The clause in question is susceptible of no misunderstanding. It is clear and unquestionable. By this clause, either party could cancel the contract after three months' notice in writing without giving any reason for their action. The term of the contract being indefinite, the notice could be given at any time. The argument of the defendants that they have spent \$10,000 in establishing the business and in appointing agents all over the province of Ontario, and that they would not have done so under a contract good, practically, for only three months, cannot have any weight with

the majority of this Court. The contract may be hard on them, but they are experienced business men, they signed freely and they must suffer the consequences of their ill-advised action. The further fact that the defendants were promised a bonus out of the profits for the first three years is disposed of by the cancellation clause in question. The directors could never have agreed to anything but the very cancellation which is so clear in its terms, otherwise, for three years, they might have been saddled with undesirable agents and undesirable and, perhaps, ruinous risks. In any event, a further clause, namely:—

“But every contracting party herein shall have the right nevertheless to cancel,” coming after the clauses relating to remuneration, cannot, by the use of the words “but” and “nevertheless,” be misunderstood. The contract is clear, unequivocal and positive, and must be given effect to. It was further contended that the fact that insurance contracts end at the expiration of the year necessarily required a continuance of the contract until the end of the year. This is an error. Contracts are made every day, and not only once a year on the 2nd of January. Therefore, to wait until every contract or premium expired or became due, would mean an indefinite life for the contract. The majority of this Court is of the opinion to confirm the judgment of the Superior Court, with costs.

TELLIER, J.:—The resolution of the directors of the company says that the contract will be indefinite, and the resolution is embodied in the contract. The defendant's own interpretation of the contract is in plaintiff's favour, because they have acquiesced in the notice received, and have instituted an action in damages against plaintiff, and that action is still pending. The contract could be resiliated at any time during the year. I am of opinion to confirm.

ARCHIBALD, J., was of the opinion to reverse, and dismiss plaintiff's action, with costs, on the principal ground that the true interpretation of the contract was that it was for three years at least, and could only be cancelled by the notice called for after the expiration of such three years.

QUEBEC.

COURT OF REVIEW.

JUNE 2ND, 1908.

SANGALLO v. LAURIN ET AL.

*Negligence—Workman—Injury to the Person—Subsidence
of Soil—Inevitable Accident.*

Coram, TELLIER, HUTCHINSON, and BRUNEAU, JJ.

In review of the verdict of the jury rendered on the 9th January, 1908. Plaintiff has made two motions in this case, the first for a judgment in his favour notwithstanding the verdict of the jury rendered in favour of the defendants, and the second, for a new trial. The defendants have made one motion asking for a judgment in accordance with the verdict of the jury. The case was reserved for the consideration of this Court by the learned Judge who presided over the trial.

TELLIER, J.:—The plaintiff, along with some others, was engaged in digging a drain, and a quantity of earth and stone fell from the side of the drain upon the plaintiff and broke his leg. The jury found that no one was to blame, and, consequently, the accident was the result of fortuitous event. The defendants could not be condemned in damages if no fault was proved against them, and the verdict of the jury exonerating them from all blame must be sustained. There is no evidence of record that the jury was led into error by the Judge's charge. And, in any event, the plaintiff only objected to the charge after the jury had brought in their verdict. The law clearly says objections to the charge must be made before the case is given to the jury and the verdict is rendered. The jury having decided on the question of fact that there was no fault on the part of any one, we cannot disturb that verdict, because there is evidence of record to substantiate it. The verdict is clearly not against the weight of evidence. Plaintiff's two motions are dismissed, with costs, and defendants' motion is granted, with costs.

HUTCHINSON, J., dissented, and was of the opinion that the plaintiff should be allowed a new trial on the ground that the defendants were engaged in dangerous work, and did not

take the care that the law requires in protecting their employees against accident, and that, consequently, the jury did not award the plaintiff any damages when he was clearly entitled to them; and, further, that the Judge misdirected the jury, and, finally, that the verdict is clearly against the weight of evidence, and that the evidence clearly shows that the accident was neither inevitable nor fortuitous.

QUEBEC.

COURT OF REVIEW.

JUNE 2ND, 1908.

ROBERT v. BEIQUE.

*Railways—Negligence—Injury to the Person—Brakeman—
Liability of Company.*

Coram, TELLIER, ARCHIBALD, and SAINT PIERRE, JJ.

In review of the judgment of the Superior Court, St. Hyacinthe, Demers, J., rendered the 1st December, 1906. Plaintiff sued to recover \$10,000, being the damages he suffered by the loss of his left leg while engaged in his work as brakeman upon "The Quebec Southern Railway Company," alleging that the accident was caused by the locomotive moving too rapidly at the moment of coupling, and that the brakes on the tender of the locomotive were in bad order. The plea was that the accident was the result of the plaintiff's own negligence. The Superior Court found that the plaintiff was in fault in being where he was at the time of the accident, and in standing upright on the top of the car, which had snow on its roof, but it found that there were no brakes at all upon the tender of the locomotive, and reduced the damages for common fault, and gave plaintiff judgment for \$2,500.

SAINT PIERRE, J.:—There are two grounds of negligence alleged against the defendant, namely: 1. The locomotive was making the coupling when going too fast. 2. The brakes on the tender were out of order. We find both points completely established by the proof of record, and on this point we confirm the judgment of the Superior Court. But the learned

Judge in the Court below found that there was imprudence on the part of the plaintiff in being where he was in an upright position at the time of the accident. We are unanimously of the opinion that there is error in the part of the judgment. We find that the plaintiff's duty required him to be where he was at the time of the accident, and it would have been impossible for him to be sitting down instead of standing up, as was suggested in the Court below. Plaintiff was doing his work at the place where he had a right to be, and he was doing it in the ordinary and usual manner in which it is done, and we cannot find anything of record to show that he contributed in any way whatever to the accident. Speaking for myself personally, I would not have found any fault upon plaintiff's part. We consequently confirm the judgment of the Superior Court, but for other reasons, with costs.

QUEBEC.

COURT OF REVIEW.

JUNE 2ND, 1908.

GRENIER v. CONNOLLY.

Negligence—Seaman—Unseaworthy Vessel—Loss of Life—Damages.

Coram, TELLIER, HUTCHINSON, and BRUNEAU, JJ.

In review of the judgment of the Superior Court, Montreal, Lafontaine, J., rendered the 14th June, 1907. Plaintiff sued to recover from the defendant the sum of \$3,000, alleging that he suffered to that extent by the death of his son through the fault and negligence of the defendant in sending him (plaintiff's son) in an unseaworthy boat, the tug boat "Mersey," down the St. Lawrence River in the direction of Seven Islands. The boat sprung a leak when about opposite Rimouski and sank, and four other members of the crew were drowned in addition to plaintiff's son. The grounds of negligence alleged were: 1. That the "Mersey" was not in a navigable condition when it left Quebec. 2. That there were no life saving appliances on the boat. 3. The officers, and especially the captain, did nothing to help to rescue the crew.

The defence was that the boat was properly equipped, was in a good, sound, navigable condition when it left Quebec; that it had been inspected before its departure, and that the plaintiff's son had lost his life through peril of the sea for which, in law, defendant could not be held answerable. The Superior Court dismissed the plea and gave plaintiff judgment for the sum of \$700.

BRUNEAU, J.:—This case resulted from the same accident, and the present judgment will apply to both cases. The proof of record establishes the brutal and positive fact that the former proprietor of the "Mersey" had abandoned her when she came into the possession of the defendant. She never ventured beyond the boundaries of the harbour of Quebec, the craft was considered finished and rotten. Several witnesses refused to sail in her, and the clearest explanation of the cause of the accident comes from the captain of the boat who said that the boat was played out and the nails in her sheathing simply gave way. This is all the more clear from the fact that the boat did not touch bottom from the moment she left Quebec until the place of the accident, and there must have necessarily been something more than ordinarily wrong for water to rush into her hold in the way it did. There can be no question here of fortuitous event as alleged by the defendant, for it was easy to foresee that in the unseaworthy condition of the boat that she was not fit for the purpose for which she was employed. On the contrary, the circumstances surrounding the loss of the vessel form a strong presumption that she was unseaworthy, and it was for the defendant to rebut and destroy that presumption. The mere fact that the vessel was inspected prior to her departure does not in any way destroy that presumption. The fact of the vessel's good condition must be affirmatively proved by evidence. There is no such evidence in the record. There can be no question, therefore, in our minds but that, on the facts of the case, the "Mersey" was unseaworthy, and that her unseaworthiness was the immediate and direct cause of her foundering, and of the consequent loss of the life of plaintiff's son.

The defendant has invoked in his favour two propositions of law: 1. The proprietor of a vessel does not warrant his crew against the unseaworthiness of the vessel, but he is simply bound to warrant them that he has taken reasonable means to see that the vessel is seaworthy. 2. The proprietor

is not responsible for the cowardice of the captain in charge of his vessel, and if it is true that the captain did not do his utmost to save the lives of the crew, the proprietor of the ship cannot be held answerable therefor. We answer both questions in a few words. The first proposition of the defendant is absolutely contrary to the law as contained in the statutes governing merchant shipping and to the law contained in our Civil Code. As to the second question, the judgment of the Court below establishes beyond a doubt the cowardice of the officers generally and of the captain in particular at the moment of the accident—the captain was the first to leave the sinking tug and did nothing whatever to help the younger and more inexperienced members of his crew whom he abandoned to their fate. The captain, the engineer, and the second officer took possession of the only boat, a boat capable of containing all the members of the crew, and rowed away from the sinking ship. The captain is the agent of the proprietor, and the acts of the captain bind the proprietor. The negligence of the captain is the negligence of the owner. We are unanimous, therefore, in confirming the judgment of the Superior Court, the more so as the damages allowed, \$700, are very moderate. The defendant is condemned to the costs in both Courts.

QUEBEC.

COURT OF KING'S BENCH (APPEAL SIDE).

MAY 25TH, 1908.

CHAURET v. PILON.

ATTORNEY-GENERAL OF QUEBEC v. PILON.

Rivers and Streams—Riparian Rights—Crown Grant—"Bed of River"—Non-tidal Waters—"Up to the Water"—Art. 400 C. C.—Boundary Action.

Both cases were united at the request of the respondent in the Court below, and one judgment was rendered for both cases. The judgment appealed from was delivered on the 19th of January, 1907, by the Superior Court,

Montreal, ARCHIBALD, J., and dismissed plaintiff's action and the intervention. The appellant, Chauret, and the respondent are neighbouring proprietors of two beach lots on the Riviere des Prairies (Back River), within the parish of St. Genevieve. Appellant, by his action, claimed that the respondent was trespassing on his beach lot by anchoring his pleasure boats there, building a bath house, establishing a sort of small jetty with stones, and by his action appellant asks that these acts of proprietorship cease, that the obstructions be removed and that respondent pay him \$50 damages, including the cost of a notarial protest. Respondent pleaded that appellant's title to his lot was null because the Crown (from whom appellant had purchased) was not the owner of what it had pretended to sell to appellant; that the bed of the river in question is inalienable; that respondent had a prior and better title to the use of the shore from the Gentlemen of the Seminary, and in doing what he had done he had simply followed the custom of those who had country houses on the river side in the locality in question. Appellant thereupon called upon the Crown to protect him, and the Crown pleaded it had the right to pass title to the appellant as it did and denied that respondent had the right to any of the concessions he claimed in his plea. The Court below did not adopt the reasoning of respondent in its judgment. It decided that the respondent was proprietor to low-water mark, and, consequently, that appellant's title to the land between high and low water is null. It dismissed the action and the intervention. The appellant, Chauret, says the two following questions have to be decided on his present appeal: 1st. Could respondent use appellant's lot in the manner he did? 2nd. Should an action in boundary have been taken before the present one? The other appellant, the Crown, argues that in so far as its appeal is concerned, the question to be decided here is, what constitutes the bed of a river? Does it mean that part of the river from bank to bank, when the waters are swollen, or does it mean only that part which is permanently covered with water? The first Court adopted the second hypothesis, but with a distinction between tidal and non-tidal rivers. The seigneurial Judges decided that the riparian owner in the case of non-tidal waters was proprietor of the beach "up to the water." It is the interpretation of these words "up to the water" which is the substantive question on the Crown's appeal. The Crown argues that the words mean to the water at its highest point,

while Mr. Justice Archibald held that it "evidently meant the water at its lowest point."

TRENHOLME, J.:—To whom does the beach belong between high water and low water in a non-navigable river? That is the first question to be decided, and then there is the further question as to whether an action in boundary should have been taken by the appellant instead of proceeding in the way he has done. Article 400 of the Civil Code says:—"Roads and public ways maintained by the State, navigable and floatable rivers and streams, and their banks, the seashore, lands reclaimed from the sea, ports, harbours and roadsteads and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the Crown domain." But the question is, "What is the bed of a river?" All the books say it extends to high water mark within the banks of the river. There cannot be a doubt, therefore, to the rights of the Crown upon the bed of rivers up to high water mark. The Court is unanimous that the Crown had the right to cede the lot in question. The learned Judge in the Court misinterpreted, while quoting, the jurisprudence as laid down by Mr. Justice Badgely while acting as a member of the Seigniorial Commission. The law then laid down conforms in every way with article 400. There is also no doubt in our minds that the Attorney-General not only had the right, but he also had the duty to intervene in the present suit.

There remains the question whether the appellant should have taken an action in boundary. But an action in boundary is only required in cases where there is trespass or want of recognition of the property rights of another. In this case there could be no mistake as to the location and the extent of the water lot. When the water was high it formed a little bay and was divided from the neighbour's by an imaginary straight line. An action in boundary was not necessary, therefore, and we think the action was well taken in the present form. The respondent tried to treat as an insignificant question the anchoring of boats and the establishment of a bath house. We do not think the matter is at all insignificant. On the contrary, it was a serious matter to establish immediately in front of the appellant's property a large bath house used by a great number of people, who were guests of the hotel, and we think that appellant was fully justified in taking this action. The conclusions of our judgment are,

therefore, to maintain the injunction restraining respondent from continuing to exercise any rights of ownership upon the beach lot in question, and as the appellant has not proved any damages, we will condemn the respondent to nominal damages in the sum of \$10, together with the costs in both Courts.

BOSSE, J., dissented as to the amount of damages and as to the costs.

QUEBEC.

COURT OF KING'S BENCH (APPEAL SIDE).

MAY 25TH, 1908.

AGNEW, ET UXOR, v. GOBER, ET VIR.

Marriage Law—Husband not of Age at time of Solemnization of Marriage—Action by Parent to Annul—Conflict of Laws—Lex Fori—Consent of Parents.

Coram, TASCHEREAU, C.J., BOSSE, TRENHOLME, LAVERGNE, and CROSS, JJ.

This is an appeal from the judgment of the Superior Court, Montreal, DAVIDSON, J., rendered the 29th June, 1907, maintaining an inscription in law filed by the respondent Dame Mary Gober and dismissing plaintiff's action with costs. Plaintiff's action was taken for the purpose of annulling the marriage contracted in 1904, between the present female respondent and her husband, on the ground that at the time of the marriage respondent's husband, plaintiff's son, was still a minor, and that the contracting parties had failed to obtain their antecedent consent to his marriage. The marriage was celebrated on the 14th December, 1904, by the rector of the Anglican Church at St. James in Kingston, Ontario, where respondent's husband was a cadet at the Royal Military College, and where his wife was principal of the Kingston Ladies' College. In the affidavit made by young Agnew at the issuing of the license and before the marriage was celebrated, the contracting parties are described as "of

the city of Kingston;" they are similarly described in the marriage certificate. The marriage was celebrated according to the form prescribed and it conformed with the law of Ontario. The plaintiffs only became aware of the marriage on the 21st of February, 1905, and on the 10th of June, 1905, took their present action. The ground on which they ask to have the marriage set aside is that their son was at the time of his marriage under twenty-one years of age, that he, in consequence, required their consent to his valid marriage and that he did not obtain such consent. They ask for the annulment of the marriage. Some time before the institution of the action the plaintiff's son became of age. Mrs. Agnew (respondent), appeared with the authorization of a Judge of the Superior Court, her husband being absent from the country, and, by a declinatory exception, challenged the jurisdiction of the Courts of this province, as at the time of her marriage both she and her husband were domiciled in Kingston, Ontario, where she had for many years resided, and the action should have been taken there. This exception was dismissed on the ground that young Agnew had not lost his domicile of origin (Montreal), and being a minor the domicile of his parents was his domicile. Mrs. Agnew also raised an exception to the form, which was also dismissed. She then pleaded to the merits and filed an inscription in law, alleging that her marriage could not be challenged on the ground that at the time of the institution of the action her husband was of full age, and that his parents had, in consequence, lost any right of attacking his marriage with her. She also raised the question whether parental authority was necessary, asserting that parental authority for a minor to marry is a mere matter of form, and, as such, regulated by the law of the place of the celebration of the marriage, by which law she declared her marriage to be incontestible, valid and binding. This inscription in law was maintained in the Superior Court, the principal ground of the judgment being that inasmuch as plaintiff's son had attained his majority before the institution of the action for annulment, this fact completely barred plaintiffs' right of attack and rendered their action bad in law. This is the only point now raised by the present appeal.

TRENHOLME, J., dissenting, said: Respondent contended that the judgment of the Court below was right in maintaining her demurrer, inasmuch as the action to annul her mar-

riage with appellants' son is merely an incident of their parental authority, and their right of action necessarily terminated with that authority. The appellants laid stress on the authority of the French law and the French writers, but an examination of the systems of France and of this province regulating the law governing parental authority would clearly and indisputably establish the greater severity of the French law towards children and the rigour with which respect for parental authority is insisted upon. Our law allowed a much greater degree of liberty and was altogether far less restrictive. Respondent further argued that the spirit of the law favoured marriage, and any possible doubt arising under the circumstances of the present case should be interpreted rather in favour of maintaining the validity of a marriage than of annulling it. On the other hand, appellants say the law governing the subject is contained in articles 119, 150 and 151 of our Civil Code, and that these articles must be applied and be given effect to. The present appeal, therefore, raises the very important question, and it is the only one we have to discuss, whether the parents of a minor child can institute an action to annul the marriage of such minor child, contracted without their consent, when once such child has attained its majority. Speaking for my learned brother, Mr. Justice Cross, and myself, it is to be regretted that our law upon this important question should be so uncertain. But, the question being before us, we must apply the law, even though the law is obscure and insufficient and ambiguous. In this case, I am of opinion that the judgment of the Superior Court is according to law, and should be confirmed. My principal reason for dissenting from the judgment of the majority of the Court, about to be rendered, is that when a person comes of age, he thereby, and for the rest of his life, acquires the immediate plenitude of his rights, and under no authority can anyone exercise these rights for him or take them away from him. In my opinion, it is exorbitant, it is not permissible, under our law for a father and mother to be allowed to separate from his consort their minor child who has married without their consent and comes of age in the meantime. I think our law on the subject differs essentially from the Code Napoleon. Even up to the age of 30 and long after the age of majority has been reached, the French law requires the consent of the parents to their child's marriage. This is obtained by means of what is known as a "respectful requisition," which by article 123 C. C., is no

longer required under our law. Article 324 C.C. says "that majority is fixed at the complete age of 21 years. At that age persons are capable of performing all civil acts." This article is clear; its meaning is unmistakable. Our law is therefore entirely different from the French law. Article 119 C. C. is also a strong argument in favour of the respondent. The tutor or curator could not bring the action after the minor had come of age, and under what authority can the father and mother exercise greater powers than the tutor or curator? It could only be under parental authority, which under our law, becomes obsolete and of no effect upon the minor attaining the age of majority. (Article 243 C.C.). The father's authority is no greater than that of the family council, and under the old law, upon which our code is based, and which shews the intention of the legislator, the family council could override the father's wishes. Mr. Justice Cross and myself, therefore, dissent from the judgment about to be rendered.

TASCHEREAU, C.J.:—The question involved in this case comes before this Court for the first time. The question is not one of sentiment; it is purely a question of law. The text of our law is there; we must apply it. The articles of the Code governing the case are 119, 150 and 151 C. C. Art. 119. "Children who have not reached the age of 21 years must obtain the consent of their father and mother before contracting marriage; in case of disagreement, the consent of the father suffices. 150. A marriage contracted without the consent of the father or mother, tutor or curator, or without the advice of a family council, in cases where such consent or advice was necessary, can only be attacked by those whose consent or advice was required. 151. In the cases of articles 148 and 150, an action for annulling marriage cannot be brought by the husband or wife, tutor or curator, or by the relations whose consent is required, if the marriage has been either expressly or tacitly approved by those whose consent was necessary; nor if six months have been allowed to elapse without complaint on their part since they became aware that the marriage had taken place. Art. 148, referred to, has no bearing on this case. There are, therefore, four essential conditions which require to exist before the parents of a minor child can annul its marriage, namely:—

First—There must be minority in one of the parties at the time of marriage.

Second—No consent on the part of the minor's parents.

Third—No approbation by the parents of the minor subsequent to the marriage.

Fourth—Proceedings must be taken by the parents of the minor within six months from the date the fact of marriage came to their knowledge.

This is all that is required by Articles 119, 150 and 151 of the Civil Code; the fifth condition, namely, that the minor must not have attained majority before the action is taken is not, in the eyes of this Court, an essential one.

Parents are allowed to attack the clandestine marriage of their children, not only because of the breach of parental authority, but because of the protection the law wishes to give to the minors themselves. Young persons, owing to the ardour of their temperament, not infrequently form alliances which are not in keeping with the standing of their family. When the minor attains the age of majority the parental authority is at an end as regards the future, but still exists as regards the past. This is the doctrine of all the French writers on the subject with the exception of Demolombe. Were the other system to prevail and parents be made to attack the marriage of their minor children, once the minors had attained their majority the remedy would be of little use, as most of these clandestine marriages are contracted on the very threshold of majority. We are not here to discuss the civil effects of marriage as contained in articles 162, 163 and 164 of the Civil Code, more particularly as in the present case there are no children. The consequences of the marriage, therefore, are of no effect unless in the case of good faith, but when one of the parties is a minor there can be no question of good faith.

The prior consent of the parents was exacted not so much out of respect for the parents, but more as a protection to the minor. In every other contract, even the simplest and least important, the minor cannot act alone. Can it be argued in the case of marriage, a contract terminating only with the death of one of the parties, the Legislature intended to give the minor the right to contract unaided and of his own free will? The right of action to annul the marriage of a minor continues to exist after the minor has obtained the age of majority because a right of action to annul an act done by a person incapable of contracting alone still continues to exist after the incapacity has been

removed, except the act is ratified, when it is not an act absolutely null. If the minor marries without the consent of his parents and keeps the matter quiet and attains the age of majority, the parents would find themselves without a remedy. And, in almost every case, this would be the natural consequence, since through fear of displeasure of his parents and with the connivance of interested parties, the marriage would be kept secret until the minor would have come of age. The system adopted by the learned Judge in the Court below would eventually result in refusing recognition to the articles cited of the code. The only ratification recognized by law is the failure of the interested parties to take action within six months. If the Legislature intended that the condition in issue in this case was to have the effect of extinguishing the right of action, it would have said so in so many words. In the present case it is a question of the capacity of the parties and not of the place where the marriage was celebrated.

The authors and the jurisprudence of the Courts in France, with the exception, as I have said, of Demolombe, allow the action by the father to annul the marriage of his minor child even if, in the meantime, the minor has come of age. The father alone can ask to have the marriage annulled; the minor himself cannot ask for it. It is the father's own and exclusive right. The fact that the tutor's powers cease with majority cannot affect the rights of the father, as the two are essentially dissimilar. The action belongs to the father because he is the father, to protect the honour of the family, and to watch over the interests of the minor. It is true that if the marriage is annulled both parties, being of age, can marry again, but of what value is this objection. Being of age, they are free to marry. In any event, the contestation made in the present case leaves little likelihood that the parties will re-marry. The errors into which the judgment of the Superior Court would lead us, if we were to maintain it, are too serious and too diametrically opposed to the clearly stated text of our law. No text of law justifies the judgment of the Superior Court. Appeal allowed, and judgment of the Court below reversed, with costs.

QUEBEC.

COURT OF KING'S BENCH (APPEAL SIDE).

MAY 22ND, 1908.

DESLAURIERS v. JASMIN.

*False Arrest for Alleged Crime—Damages—Justification —
Reasonable Cause.*

Appeal from the judgment of the Court of Review, Montreal (PAGNUELO, PARADIS and LAFONTAINE (dis., JJ.)), rendered 30th November, 1906, which reversed the judgment of the Superior Court, Montreal, ARCHIBALD, J., rendered the 7th May, 1906, and dismissed the plaintiff's action, with costs. The action was one for false arrest and malicious prosecution without reasonable and probable cause, the defendant having had plaintiff arrested for brutally ill-treating a bull; the property of defendant. Defendant pleaded he had reasonable and probable cause to act as he did; the plaintiff and his son having volunteered no information as to who had ill-treated the bull, but on the contrary had laughed when defendant complained to them about it. The Superior Court found that the act of cruelty (tying a tin can to the bull) was not committed by the plaintiff, that the warrant was issued only on suspicion aroused in defendant's mind, and when the facts could have been easily ascertained, and in such a case malice may be inferred. Damages to the extent of \$100 and costs were granted. The majority of the Court of Review held, however, that as the plaintiff did not try and catch the animal and did not declare all the circumstances in connection with the matter until at the preliminary hearing of the complaint in the Police Court, when they were thoroughly conversant with them all the time, that he had suffered no damage, and that the humiliation imposed upon him was the result of his own conduct. The judgment was reversed. Appellant argues that merely suffering the principal (the one who commits the offence) to escape will not make the party an accessory after the fact: Harris, Prin. of Crim. Law, p. 36. Appellant had probable cause to do as he did. Appellant was not responsible for his employee on a frolic of his own: Pollock, Law of Torts, 84. The slowness of respondent in causing appellant's arrest is another element to be considered respecting the honesty of his conviction

that appellant was guilty of the offence: *Drapeau v. Deslauriers*, 16 R. L. 433. Appellant cites, on reasonable and probable cause, *Hilliard on Torts*, p. 429; *Odgers on Libel*, 3rd ed., p. 330; *Burrows v. Ransom*, Q. O. R. 3, Q. B. 152; on the amount of damages, *Parker v. Landridge*, Q. O. R. 1 Q. B. 45.

Respondent submits that the appellant was witness to a crime committed by his father's employee, over whom appellant had control. The crime was committed on an animal of which he was bound to take care, since it was in his pasture. He contents himself with laughing at first, and does nothing to relieve the animal, although he could have easily and immediately done so. The two families, the appellant's and the respondent's, had till then always been on the best of terms. Respondent knew his bull had been on appellant's farm, and that the appellant must know something about the matter. Appellant never mentioned the matter, and respondent was justified in presuming that appellant was trying to avoid him by reason of his guilt. A letter written by respondent to appellant's father on the subject matter of the offence received no answer. The arrest of appellant was justified.

TASCHEREAU, J.:—There was certainly reasonable and probable cause. For the reasons stated by the Court of Review, the majority of this Court is of the opinion that the appeal must be dismissed, and it is dismissed, and the judgment of the Court of Review is confirmed, with costs.

BRUNEAU, AD HOC, J., dissented, and was of opinion that the warrant was issued only on suspicion of the plaintiff's guilt, and that did not suffice to relieve the complainant from responsibility for the damages plaintiff had suffered by being arrested.

QUEBEC.

COURT OF KING'S BENCH (APPEAL SIDE).

MAY 22ND, 1908.

WOLF ET AL. v. BROOK.

*Contract—Construction—Slaughtering Animals in Abattoir
—Royalty—Termination of Contract.*

Appeal from a judgment of the Court of Review (Fortin, Charbonneau and Dunlop, JJ.), rendered the 25th October,

1907, which judgment modified the judgment of the Supreme Court for \$1,202.56 in favour of the respondent by adding to that sum so as to raise the condemnation to an amount of \$3,616.66, the judgment of the Superior Court, presided over by Mr. Justice Tellier, having been inscribed in review by the respondent. The action was taken for the recovery from the appellants of two cents for each beef animal slaughtered by the Montreal Union Abattoir Company between October, 1901, and January, 1905. The Superior Court was of opinion under the contracts sued upon, that respondent's right to receive the royalty expired on November 1st, 1902, and gave him judgment for 2 cents for each animal killed between October, 1901, and November, 1902, being \$1,202.56. Respondent appealed to the Court of Review and the only question there to be determined was whether appellants' obligation to pay royalties expired on November 1st, 1902; if it did not so expire, it was not denied that judgment must go against appellants for \$3,616.60. The Court of Review modified the judgment of the Superior Court and gave judgment for \$3,616.60. On the present appeal, appellants argue the whole question is whether or not the Court of Review was right in modifying the original judgment. Appellants submit that the contract of the 23rd October, 1897 (the original *lien de droit* between the auteurs of the parties), was never revived, and that it would have come to an end on the 1st November, 1902, being the natural duration of its life, and that it was not renewed. In addition to this, appellants set up that in any event the above contract was cancelled by a judgment of the Superior Court in January, 1902, and it is absolutely out of the question in any shape or form of being the subject of a continuation or extension. Appellants ask for the restoration of the Superior Court judgment. Respondent argues that the deed of October 27th, 1897, clearly provided that the contract was to last five years or ten years at the option of the appellants, who were not even required to give any notice of renewal, but had only to stay on. No doubt the appellants had the right to terminate after five years, and had they done so, they would no longer have been bound to respondent. Respondent's position, however, would have been very different in that case. He would then have had an opportunity of himself bargaining with the abattoir company for a new contract.

Cross, J.:—The principal question in this case is to interpret the following paragraphs of the transfer between the parties: "9. The present contract will terminate on May 1st, 1901. 10. If the parties of the second part (appellants) enter into a new contract with the Union Abattoir Company, then the present agreement will last till the expiration of the said contract if it be for a longer time than May 1st, 1901, but, in any event, the present contract is for said period." The appellants did succeed in making a new contract with the Abattoir Company on October 23rd, 1897, and a covenant of it said that it (the contract) "is made for five years from November 1st next and upon the determination thereof the party of the first part shall have the right to renew the same for a further term of five years upon the same conditions, except as to rental." Omitting all other grounds of defence, upon which appellants have failed, the principal ground of defence relates to the construction to be placed upon the written agreements as affecting the respondent's claim for the period of time which commenced November 1st, 1902; that is, after the expiry of the first five years under the new contract. The plain language of the agreement is against the appellant's inference as drawn from the case to make it impossible for them to destroy or abridge the rights of the transferors for five years. If any effect is to be given to the words "if it be for a longer time" in paragraph 10, it must be an effect fatal to appellant's contention. The question then resolves itself into an enquiry as to whether or not the royalty agreement expired on November 1st, 1902. It is clear that it cannot be said that at the end of the first five years, the parties stood free. On the contrary, the Abattoir Company remained bound if the appellants elect to hold it bound. The contract was suspensive as to the last five years; it was an option with the appellants. In law, the realization of such a condition operates with retroactive effect—*Pand. Fran. vo. Obligation, Nos. 1265, 1231*. So that appellants, electing at the end of five years to continue the contract, gave to it the same effect as if it had been made at the outset for a term of ten years. This being so it is brought within the terms of the agreement in the transfer contract as being a contract "for a longer term," to which the royalty covenant agrees. The holding of the Court of Review in this sense is therefore a proper one and the judgment appealed from is unanimously confirmed and the present appeal dismissed, with costs.

QUEBEC.

COURT OF KING'S BENCH (APPEAL SIDE).

MAY 22ND, 1908.

THE COLUMBUS FISH AND GAME CLUB v. THE W.
C. EDWARDS CO., LTD.

Trespass to Land—Cutting Trees—License — Deed — Construction.

Appeal from the judgment of the Court of Review, Montreal (FORTIN, CHARBONNEAU and DUNLOP, JJ.), rendered the 25th October, 1907, which reversed the judgment of the Superior Court, Ottawa, CHAMPAGNE, J., rendered the 7th May, 1907, and dismissed plaintiff's action and dissolved the injunction issued in the case reported in 4 E. L. R. 212. The action was taken to recover \$5,500 for depreciation of property caused by defendant cutting down trees on plaintiff's property and trespassing thereon. An injunction was also asked for by the conclusions of the declaration. The plea was that defendant had a right to cut timber on the land. The Superior Court granted \$406.60 damages and made the injunction permanent. The Court of Review reversed that judgment, dismissed the action, and dissolved the injunction on the ground that the action was premature. It is from this judgment that the present appeal is taken.

CROSS, J.:—The principal question to be decided is whether the period of three years throughout which one Maille had reserved the right to cut the timber, which was subsequently sold to the respondents, had expired before the dates of the lumbering complained of or not. The answer to this question depends upon the answer to be given to the further question whether the three years "a compter de l'automne prochain" are to be counted from the beginning or from the end of the autumn of the year 1902. The question is primarily dependent upon the construction to be placed upon the deed from Maille to respondent. A delay which is to run from a certain date or period is generally to be computed after or from the end of such date or period. Nevertheless, it can sometimes be seen either from the purport of the particular document or from the proved facts, or from both, to have been the intention of the parties

that the day or period from which a delay is to run should be counted into and form part of the delay, and when this clearly appears, effect is to be given to such intention. 8 Merlin, Rep. vo. "Délai"; D. R. vo. "Obligations," Nos. 857 and 858; D. R. vo. "Délai," Nos. 32 and 33; Rolland de Villargues, Dict. vo. "Délai," No. 28. A consideration of the facts of the case leads up to the conclusion that, upon a proper construction of the deed, the three years ran only from the end of the first autumn, and that in consequence, the respondent still had the right to cut timber when it did cut it. There remains for consideration only the appellant's pretension that the respondent violated the injunction by continuing operations after the issue of the injunction. Affidavits of very reputable people, the heads of the respondent company, establish that upon service of the injunction orders were immediately given to stop all operations forthwith upon the disputed timber. In view of these affidavits, the learned trial Judge, who maintained the appellants' pretensions in other respects, granted the motion for a rule nisi for costs only. This adjudication was not expressly set aside by the judgment appealed from, and, under the circumstances, should not now be destroyed; though, to avoid misconception as to the effect of the judgment of the Court of Review upon it, it is now formally confirmed. We are unanimously of the opinion to dismiss this appeal and confirm the judgment of the Court below, with costs.

QUEBEC.

COURT OF KING'S BENCH (APPEAL SIDE).

MAY 22ND, 1908.

THE MOORE CARPET COMPANY, LIMITED v. MITCHELL.

Debtor and Creditor—Company Law—Winding-up—Status of Creditor—Requirements of Winding-up Act—Demand—Proceedings dehors the Statute—Competency of Same—Similarity of English and Quebec Law.

Appeal from the judgment of the Superior Court, Saint Francis, DEMERS, J., rendered the 2nd January, 1908, order-

ing the winding-up of the company appellant, and appeal also from two interlocutory orders by the same judge on the 26th December, 1907. Petitioner asked for the winding up of the company, and alleged that it owed him \$313.27 on a bill and open account and \$600 on a note. The petition alleged the insolvency of the company and respondent moved for particulars. The particulars were furnished, and respondent's motions, one to have the particulars rejected because they were not accompanied by an affidavit, and a second because they were not proper particulars, were both rejected. In its plea to the merits the company contented itself with denying its insolvency or any admission on its part that it was insolvent. Appellant says the main question for the decision of this Court is a question of law, namely: can a creditor of a company ask for a winding-up order against it, otherwise than under the provisions of section 3 of chapter 144, R. S. C., 1906 (Winding-up Act)? No demand was made upon the company under section 4 of the above Act for the payment of the debt, nor did the company do any act which would bring it under the provisions of said section 3. The Court below seems to hold that it had a right to go outside of the sections of the Winding-up Act, and that as in its opinion the company might be considered insolvent, the Court, therefore, made the order accordingly. Appellants submit this is wrong: Interpretation Act, chap. 1, R. S. C., 1906, sec. 33; Endlich on Interpretation of Statutes, sections 41 86; in re Qu'Appelle Valley Co., 5 Man. L. R., 160; in re Rapid City Farmers' Elevator Co., 9 Man. L. R. 574; In re Britton Medical and General Life Ass'n, 11 O. R. 478; In re Ewart Carriage Works, Ltd., 8 O. L. R. 527; 4 O. W. R. 149 (Magee, J., p. 151; 5 Thompson, Commentaries on the Law of Corporations, No. 6704, pp. 332, 333). Under these circumstances appellant submits that the company is not shewn to be insolvent in the meaning of the Winding-up Act. The fact that all the assets are either mortgage or under warehouse receipts is not alone sufficient to make a debtor insolvent: *Lake Winipeg v. Trading Co.*, 7 Man. R. 255. On the appeal from the two interlocutory orders appellant cites Rule of Practice of Superior Court, No. 47; R. S. C. chap. 144, sections 108, 135; *Larocque v. City of Montreal*, 8 R. de J. 244; *Landry v. Turgeon*, 9 Q. P. R. 1. Respondent argues the proof of the insolvency of the company is overwhelming. If a written demand is served and

the amount is not paid within 60 days, the company is deemed to be unable to pay its debts as they become due. If, however, the demand is not served, the onus of proof is upon the creditor, and if he succeeds in proving its insolvency, the company is then deemed insolvent. The company's officers admitted its insolvency, disclosed the facts showing insolvency in the sense of *In re Grundy Stove Co.*, 7 O. L. R. 252.

TRENHOLME, J.:—A number of Manitoba Reports have been cited by the appellant, but we think it will be sufficient for us to say that we have a jurisprudence of our own which we intend to follow. This jurisprudence is well epitomized by Mr. Justice Wurtelle in the case of the Eddy Manufacturing Co. v. the Henderson Lumber Co. Our law is very similar to the English law on the point, but it is to be pointed out that a number of the Manitoba and English reports are wrongly interpreted when they are led to convey the idea that proceedings to put a company into insolvency are limited to the provisions of section 3 of the Act. That contention is wrong. All the law requires is that a creditor for more than \$200 can make a written demand on the company debtor, and if the amount is not paid within sixty days thereafter the company is deemed to be unable to pay its debts as they become due.

We are of the unanimous opinion, therefore, to dismiss the present appeal, and to confirm the judgment of the Court below, with costs.

NEW BRUNSWICK.

FULL COURT.

APRIL 25TH, 1908.

JAMIESON v. BLAINE ET AL, LICENSE COMMISSIONERS, ST. JOHN CITY.

*Liquor License Act—Special Case—Construction of sec. 19 (1)
—Number of Licenses that may be Issued in Prince Ward
in City of St. John.*

Special case stated for the opinion of this Court, asking in effect an interpretation of section 19 (1) of The Liquor

License Act (Con. Stat. 1903, cap. 22), argued on 22nd of April instant, before BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY and WHITE, JJ.

J. D. Hazen, K.C., Attorney-General, for plaintiff.

C. N. Skinner, K.C., for defendants.

BARKER, C.J.:—This matter comes before us by way of a special case stated for the opinion of Court, as to certain powers claimed by the defendants, who are license commissioners for the City of St. John, in reference to the issue of tavern licenses in that city. The question depends upon the construction to be placed on sub-section (1) of section 19 of the Liquor License Act, cap. 22, Con. Stat. 1903, which sub-section is as follows. "19.-(1) The number of tavern licenses which may be granted in the respective municipalities shall not in any year be in excess of the following limitations:—In cities and incorporated towns respectively, one for each full two hundred and fifty of the first one thousand of the population of each ward taken separately in which licenses may be issued, and one for each full five hundred over one thousand of the population of such ward. Provided further, that in the city of St. John, subject to the provisions of sub-section (4), there shall not in any year be issued more than seventy-five tavern licenses."

The population of Prince Ward according to the last census is 4,760, which would represent eleven licenses. In fact, the commissioners granted in the year 1907, fourteen licenses, and it is on that ground that the information was laid by the present nominal plaintiff, Jamieson. On the basis of the ward populations the maximum number of licenses for the city of St. John would be, I think, sixty-four, at all events considerably below seventy-five. The right to issue the fourteen licenses for Prince Ward is based on the theory that under section 19, which I have quoted, the commissioners for St. John are not limited in the number of licenses for the city to the maxim number as determined by the ward populations, but to the maxim number declared by the section, that is seventy-five.

The argument addressed to us was that so far as the city of St. John is concerned, the number of licenses for the city is limited to seventy-five, and that the commissioners can issue up to that limit without reference in any way to

the number as derived from the ward populations. We think the commissioners are wrong in the view which they have taken as to the effect of the section in question. Their authority as to the number of licenses to be issued for the city is subject to two limitations,—first, the limitation fixed by a reference to the ward population, and last, by the arbitrary number of seventy-five, beyond which they cannot go under any circumstances. Assuming, therefore, that sixty-four would be the number of licenses for the city as determined by the ward population, that would be the limit by which the commissioners would be governed.

In answer to the question stated in the special case as follows:—"How many tavern licenses are the said commissioners authorized to issue in Prince Ward in said city of St. John, the population of said ward being four thousand seven hundred and sixty?"—we say they are authorized to issue eleven, and no more.

HANINGTON, LANDRY, McLEOD, and GREGORY, JJ., concurred.

WHITE, J.:—The question submitted to us for answer is:—"How many tavern licenses are the said commissioners authorized by law to issue in Prince Ward in said city of St. John, the population of said Ward being four thousand seven hundred and sixty, as herein stated."

The answer to this question depends upon the interpretation to be given to sub-section (1) of section 19 of The Liquor License Act (Con. Stat. 1903, c. 22). This sub-section was first enacted by section 6 of the Act, 60 Vict. cap. 6, which repealed sub-sec. (1) of section 19 of the Act, 59 Vict. cap. 5, and substituted therefor the provisions contained in the sub-section now calling for interpretation. This sub-section reads as follows:—"19 (1) The number of tavern licenses which may be granted in the respective municipalities shall not in any year be in excess of the following limitations: In cities and incorporated towns respectively, one for each full two hundred and fifty of the first thousand of the population of each ward taken separately in which licenses may be issued, and one for each full five hundred over one thousand of the population of such ward. Provided further, that in the City of St. John, sub-

ject to the provisions of sub-section (4), there shall not in any year be issued more than seventy-five tavern licenses."

It was contended on the argument that the proviso in this sub-section relating exclusively to the City of Saint John has the effect of authorizing the issue, yearly, within that city, of seventy-five tavern licenses (exclusive of the six hotel licenses provided for by sub-section (4)); and exempts St. John City from the limitations, provided for by the preceding portion of the sub-section, for cities and incorporated towns in general. I think it very clear that such is not the meaning of the sub-section. Its effect is to impose two limitations upon the number of licenses which may be issued in the City of Saint John, that is to say: First, the limitation which is made applicable to St. John in common with all other cities and incorporated towns, and which is based upon, and determined by, the population of each ward taken separately, in which licenses may be issued; and, secondly, that which is imposed in respect of St. John City alone, and restricts the total number of tavern licenses, exclusive of hotels, to seventy-five. This second limitation, it is obvious, can only become operative in case, under the limitations first provided, licenses might, owing to increase of population, issue in excess of seventy-five, were it not for such second limitation.

But while the total number of licenses which may be issued in St. John City is thus limited, I can see nothing in the sub-section which requires that such total number, when ascertained as provided by the terms, shall be apportioned among the several wards in any fixed proportion. The sub-section proposes to fix, and I think does fix, only limits to the number of licenses which may be issued in the City as a whole, and not the number which may be issued in any one ward. Other sections of the Act—for example, section 21—contain provisions by virtue of which the issue of licenses is absolutely prohibited in any ward which is within, or shall be brought within, such prohibitory provisions; and whenever in any ward no licenses can be issued, by virtue of such prohibitory clauses, the population of such ward is not to be included in computing the total number of licenses allowed for the city generally.

The repealed sub-section (1) of section 19 of the Act, 59 Vict. c. 5, for which, as already stated, the existing sub-section was substituted, reads as follows: "19 (1) The num-

ber of tavern licenses to be granted in the respective municipalities shall not in each year be in excess of the following limitations: In cities and incorporated towns respectively, according to the following scale, that is to say, in any ward of such city or incorporated town, one for each full two hundred and fifty of the first one thousand of the population in such ward, and one for each full five hundred over one thousand of the population. Provided further, that in the City of Saint John, subject to the provisions of sub-sections (4) and (5), there shall not in any year be granted more than seventy-five tavern licenses."

It will be observed that the limitation imposed by this repealed sub-section is expressly declared to be in regard to the number of licenses which may be issued "in any ward of such city." The present section omits these words, "in any ward of such city," and fixes the total number of licenses "in cities" at one for "each full two hundred and fifty, etc.," of the population of each ward taken separately. It provides, it is true, that the total number of licenses allowed for the city shall depend upon and be fixed by the population of the wards taken separately. But to say that because the Legislature has chosen to make the population of each ward taken separately, the basis upon which we are required to compute the number of licenses allowed for the City, it therefore follows that such licenses must be distributed among the wards in proportion to their population, is to read into the sub-section something which is not only not to be found there, but which, having once been in the sub-section, was stricken therefrom by the Legislature.

Why did the Legislature repeal the old, and enact the new section, unless they intended to change the law?

In *Dickenson v. Fletcher*, L. R. 9 C. P. 1, Brett, J., at page 8, says:—"Where two statutes dealing with the same subject matter use different language, it is an acknowledged rule of construction that one may be looked at as a guide to the construction of the other. If one uses distinct language, imposing a penalty under certain circumstances, and the other does not, it is always an argument that the Legislature did not intend to impose a penalty in the latter, for where they did so intend, they plainly said so." If this is true when the two statutes are merely "*in pari materia*," how much more certainly it must be true when, as in the

present case, the later Act is expressly in amendment of the former one.

In *Reg. v. Price*, L. R. 6 Q. B. 411, Cockburn, C.J., at page 416, says: "I think that when the Legislature, in legislating in *pari materia* and substituting certain provisions in that Act for those which existed in the earlier statute, has entirely changed the language of the enactment, it must be taken to have done so with some intention and motive."

It must be borne in mind that this is not the case of a mere change in verbiage made in a consolidating statute, and which may reasonably be attributed to the sole desire to improve the phraseology, or add to the graces of style. It was a change regarded by the Legislature of sufficient moment to call for the repeal of the former enactment and the substitution of the present one, by an amending Act specially passed for the purpose of making this, with some other substantial amendments to the former Act. Moreover, there is nothing in any other amendment of the law which rendered a change in s.-s. (1) of s. 19 of 59 Vict. necessary to bring its provisions into harmony with such amendment.

It may be asked, if the Legislature intended to fix the number of licenses for the city, and not for the ward, why did they make the population of the separate wards a basis of computation, and not that of the whole city. If we are to speculate upon this question, the answer to which cannot, as it seems to me, be conclusive in any event, I would reply that the Legislature did not desire to make any change as to the number of licenses allowed within the city, or as to the basis upon which that number was to be determined; but did intend to do that which, I think, they have in fact done, namely, render it unnecessary that a certain proportion of such licenses should be issued as was formerly required in each ward, where licenses are not prohibited.

While, therefore, I agree that the number of licenses which may be issued in St. John City is subject to both the limitations prescribed by the sub-section under consideration, and not alone to that secondly mentioned in the sub-section, I am unable to read the enactment as requiring that the licenses which may be issued under the section

shall be apportioned among the several wards in which licenses are allowed, in any fixed proportion, or otherwise than as the License Commissioners may determine, subject always to the proviso that licenses shall not be issued in excess of the number permitted by the the two limitations provided by the sub-section, and shall in no case be issued in any ward where licenses are prohibited.

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No. 4

QUEBEC.

COURT OF KING'S BENCH (APPEAL SIDE).

MAY 22ND, 1908.

THE EUSTIS MINING COMPANY v. BEAN.

Negligence—Employee in Mine—Master and Servant—Liability.

Appeal from the judgment of the Superior Court, St. Francis (HUTCHINSON, J.), rendered the 25th March, 1907. Plaintiff sued to recover \$749.60, due for damages he had suffered by the fault and negligence of defendant while at work in its mine. A stone, loosened from the ceiling of the chamber in which plaintiff was working, fell on him and injured his right arm. The defendant pleaded that plaintiff was a sub-foreman in his department, and that if the portion of the mine in question was not safe at the time of the accident, it was through the fault and negligence of plaintiff himself. The Court below found that the only justification for the assertion that the plaintiff was a sub-foreman was that he sometimes received more pay than an ordinary labourer, but further evidence established that plaintiff received less than the regular sub-foreman, and the Court rejected this attempt to make plaintiff responsible for the work done in the mine at the time of the accident. The plaintiff knew the rock which subsequently fell on plaintiff was loose, although it was not considered likely that there was any immediate danger from its falling. The Court below found that the plaintiff had proved his damages for the amount he had claimed, but inasmuch as plaintiff had

previously known the rock was loose, he was guilty of contributory negligence, and reduced the judgment to \$374.80, with interest and costs. The appellant contends that the stone had been examined a month or two before the accident by the plaintiff and by a man employed by defendant on account of his skill and experience in such matters, and although slightly affected, they considered it safe. Basing itself upon a judgment of the Supreme Court in the case of *Canadian Asbestos Co. v. Girard*, 36 S. C. R. 13, appellant claims no negligence can be imputed to it in that respect. Appellant further argues respondent was a sub-foreman, and in charge of the operations, and it was his duty to see that the locality was safe, and that he could not recover damages under such circumstances. (*Davidson v. Stuart, Nesbitt, J.*, 34 S. C. R. p. 223; *Burland v. Lee*, 28 S. C. R. 348; *Fawcett v. C. P. R.*, 32 S. C. R. 721; *Royal Electric Co. v. Paquette*, 35 S. C. R. 202; *Dominion Iron & Steel Co. v. Oliver*, 35 S. C. R. 517.) Respondent argues the judgment should stand. The accident was caused by the falling of the rock before the scaling gang had had an opportunity to complete their work, the foreman having previously ordered them to discontinue scaling. If he had allowed the gang to continue and complete the work, the rock would have been removed from its insecure position. Respondent was not at the time acting in the capacity of foreman. On the question of precautions to be adopted by proprietors of a dangerous industry, respondent cites: *Royal Electric Co. v. H  v  *, 32 S. C. R. 462; *C. L. & P. Co. v. Lepitre*, 29 S. C. R. 1; *Matthews v. Bouchard*, 28 S. C. R. 580; *City of Montreal v. Gosney*, Q. O. R. 13 K. B. 214; *Archibald v. Yelle*, Q. O. R. 6 Q. R. 334.

TRENHOLME, J.:—In spite of the fact that the Court below reduced the condemnation of the appellant for fault and contributory negligence on the part of the respondent, the appellant now asks us to put the whole loss upon the respondent. We are of the opinion that, at the time of the accident, respondent was not in charge of the mine, but that, on the contrary, there were others in the mine who gave him orders, and, further, that the company did not fulfil all its obligations. We think the damages allowed were very moderate. Judgment unanimously confirmed, with costs.

NEW BRUNSWICK.

FULL COURT.

APRIL 30TH, 1908.

REX v. WARDEN OF DORCHESTER PENITENTIARY,
EX PARTE SEELEY.

Criminal Law—Habeas Corpus—Indictable Offence—Plea of Guilty—Sentence—Want of Jurisdiction of Magistrate not Raised at Trial—Criminal Code, ss. 785, 787, 788—Authority to Try and Convict.

Application before Mr. JUSTICE HANINGTON, at Chambers, for the discharge of the prisoner Seeley from Dorchester Penitentiary under habeas corpus, referred by His Honor to this Court for its opinion and advice: argued on the 15th of April instant before BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY, and WHITE, JJ.

J. J. Power, K.C. (of the Nova Scotia Bar), representing the Attorney-General of Nova Scotia, for the Crown.

W. J. O'Hearn (of the Nova Scotia Bar), for the prisoner.

The judgment of the Court (BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY, and WHITE, JJ.), was now delivered by

WHITE, J.:—This is an application made by Charles Seeley, a prisoner confined in the Dorchester Penitentiary, for his discharge upon the return of a writ of habeas corpus ad subjiciendum, issued at his instance under the fiat of Mr. Justice Hanington. Upon the return of the writ before that learned Judge at his Chambers, he heard counsel on behalf of the prisoner and of the Attorney-General of Nova Scotia respectively, and, in view of the importance of the question of law involved, referred the matter to this Court, and, pending our decision, remanded the prisoner.

The material facts, as disclosed by the Warden's return to the writ, and the evidence before the learned Judge, are as follows: On the 23rd of December, 1903, a sworn information was made at the City of Halifax before George H. Fielding, esquire, stipendiary magistrate for that City, by one Nicholas Power, whereby it was charged that the

prisoner, therein described as "Charles Seeley" of Halifax aforesaid," "in November, A.D. 1903, did unlawfully break and enter the shop of J. W. White, situate at the town of Sydney in the Province of Nova Scotia, and did commit therein an indictable offence, to wit, did unlawfully steal one silver watch and other goods of the said J. W. White then being therein of the value of fifty dollars or thereabouts," etc.

Upon this charge, the prisoner was arrested in the City of Halifax, and having been brought before the said magistrate was asked by the Court if he consented to be tried by the magistrate for the offence charged, or desired to be sent up for trial by a jury at the then ensuing March term of the Supreme Court at Halifax; whereupon the prisoner consented to be tried by the magistrate summarily without a jury. He was accordingly so tried; and, being convicted upon his plea of guilty, was sentenced to a five years' term in the penitentiary at Dorchester. No objection is taken or question made, as to the regularity of the proceedings other than this: that as the offence was committed in Sydney, the stipendiary magistrate of Halifax had no jurisdiction to try the prisoner therefor even with the latter's consent, notwithstanding the arrest and all subsequent proceedings down to and including the sentence, took place within the City of Halifax.

It is this question as to jurisdiction which we are called upon to decide. There is, however, a second question which would arise in the event of our deciding the first one adversely to the Crown's contention. The prisoner, it appears was on the same day on which he was convicted as above stated, also convicted by the same magistrate for an offence committed within the City of Halifax, and upon this second conviction, was sentenced to imprisonment in the penitentiary at Dorchester "for," I quote from the commitment, "the period of five years, to commence and take effect upon the expiry of the term of (5) five years by me imposed on said Charles Seeley this day, in and by conviction got of this date made by me against said Seeley for shop breaking and theft in Sydney." It was contended by the Crown that in case we should decide the prisoner is entitled to discharge from imprisonment under the conviction first mentioned, he ought, nevertheless, to be held under the second sentence. In the view we take of the first question it will not be necessary for us to consider the second one.

By the charter of the City of Halifax, section 143 (1): "The Lieutenant-Governor in Council may from time to time appoint a barrister of the Supreme Court of Nova Scotia of at least five years' standing to be stipendiary magistrate for the City of Halifax."

By section 144 (1) of the charter: "He shall, in addition to all the powers of a stipendiary magistrate under the provisions of the Revised Statutes, 1900, chapter 33, 'of stipendiary magistrates,' and all other powers specially or otherwise conferred, have and exercise within the city all the powers conferred upon a stipendiary magistrate, police magistrate or other justice or two justices of the peace, or by any law of the United Kingdom, or of Canada, of the Province of Nova Scotia, or any Ordinance, by-law or regulation made under the same which is applicable to the city or is in force therein."

Sub-section 144 (2) reads:—"He shall have and exercise all the jurisdiction, power and authority necessary for the apprehension, conviction, commitment, and punishment of criminal offenders within the city over which justices of the peace, stipendiary and police magistrates have jurisdiction, and for the carrying into effect the provisions of this Act, and of the laws in force in the city, and the by-laws, ordinances and regulations in force in the city."

Chapter 33 of the Revised Statutes of Nova Scotia, 1900, section 1, reads: "Every stipendiary magistrate shall be appointed by the Governor in Council"; and by "The Interpretation Act," chapter 1 of the same Revised Statutes, "Governor in Council is declared to mean the Lieutenant-Governor of Nova Scotia."

Section 6 of said chapter 33 is as follows: "Every such stipendiary magistrate shall have, possess and exercise in the city, town, or municipality of the county for which he is appointed, all the powers, jurisdiction and authority, and shall perform all the duties which "The Criminal Code of 1892," "The Canada Temperance Act," and the amendments to such Acts, and all other the statutes of Canada, from time to time in force in this province and applicable thereto, purport to confer upon or require of a police magistrate, stipendiary magistrate, deputy stipendiary magistrate, sitting magistrate, two justices of the peace, or a magistrate or deputy magistrate having the power, jurisdiction or authority of two or more justices of the peace so far as the legislature of this province can confer or require the same."

I have, I think, quoted all provisions of the Nova Scotia statutes to which it is necessary to refer in dealing with the question under consideration. It is, admittedly, by virtue of this provincial legislation that Mr. Fielding acquired and held his status as stipendiary magistrate; and there can be no question that, by this legislation, the local limits of his jurisdiction are made conterminate with the area of the City of Halifax.

Before referring to Dominion legislation bearing upon the question, I would perhaps better state that for convenience such reference will be to sections as they were numbered and stood prior to the revision of 1906.

By section 785 of the Criminal Code, 1892, as amended by the Criminal Code Amendment Act, 1900, it was enacted: "785. If any person is charged in the Province of Ontario before a police magistrate or before a stipendiary magistrate in any county, district or provisional county in such province, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or if any person is committed to a jail in the county, district or provisional county, under the warrant of any justice of the peace, for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace.

"2. This section shall apply also to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada, and to recorders where they exercise judicial functions.

"3. Sections 787 and 788 do not extend or apply to cases tried under this section; but where the magistrate has jurisdiction by virtue of this section only, no person shall be summarily tried thereunder without his own consent."

Sections 787 and 788, mentioned in sub-section (3) last quoted, refer to other offences than that for which the prisoner was convicted, and do not, therefore, touch the present question.

Since the case of *In re Vancini*, 8 Can. Crim. Cases 228 (and 34 S. C. R. 621), it is no longer open to question that, under this amended section 785, a stipendiary magistrate in Nova Scotia may try any offence which a Court of General Sessions of the Peace, if there were one in that Province, would have had jurisdiction to try, provided all

conditions attached by the section to the exercise of such jurisdiction by the magistrate are complied with. These conditions are: that the accused shall be charged before the magistrate with the offence; that he shall consent to be tried by such magistrate; and that everything done by the magistrate must be done within the local limits of his jurisdiction. This last condition must be read into the section, because, by section 782 (a) (ii), "magistrate" in part LV. is to be interpreted as meaning with reference to the Province of Nova Scotia, a "stipendiary magistrate or police magistrate, acting within the local limits of his jurisdiction."

By section 539 of the Code, as amended by 56 Vict. cap. 32, a Court of General Sessions of the Peace would undoubtedly have jurisdiction to try the offence of which this prisoner was convicted.

By the information and complaint made before the magistrate the prisoner was charged with an offence committed within the province of Nova Scotia, although without the City of Halifax. By section 554 of the Code, the magistrate had unquestionable jurisdiction in such a case to issue his warrant to compel the attendance before him of the accused, if the latter resided, or was suspected to reside, within the City of Halifax. The prisoner being thus properly brought before the magistrate, and being charged before him with an indictable offence triable by a Court of General Sessions of the Peace, and having consented to be tried by the magistrate, all conditions prescribed by section 785 as requisite to give jurisdiction were complied with, provided the magistrate throughout all his proceedings acted within the local limits of his jurisdiction. But since the information was laid, the warrant issued, the consent given, the trial had and the conviction and sentence took place—in short, since every act of the magistrate was done within the City of Halifax, it follows that in all his proceedings he "acted within the local limits of his jurisdiction."

It was contended before us, on behalf of the prisoner, that it is *ultra vires* the Parliament of Canada to confer upon the stipendiary magistrate of the City of Halifax a wider criminal jurisdiction than is authorized by provincial legislation; and that, by the provincial statutes, the criminal jurisdiction given to the magistrate was restricted to offences committed within the city. The case of *In re Vancini* already referred to, is a binding authority dir-

ectly in point against this contention. In that case, it was claimed that section 785, as amended in 1900, was ultra vires of the Parliament of Canada, there being no sufficient legislation of the Province of New Brunswick to make its provisions operative in that province. The Court overruled this contention, and in doing so said: "Where once the Parliament of Canada has given jurisdiction to a provincial Court, whether superior or inferior, or to a judicial officer, to perform judicial functions in the adjudicating of matters over which the Parliament of Canada has exclusive jurisdiction, no provincial legislation, in our opinion, is necessary in order to enable effect to be given to such parliamentary enactments."

But even were it true that the magistrate can exercise no greater jurisdiction in criminal matters than is authorized by the provincial law, we think that in this case the sections above quoted from the provincial statutes furnish in themselves a sufficient answer to this last mentioned contention of the prisoner, because they expressly provide that the magistrate may exercise, within the city, all criminal jurisdiction which at any time may be conferred upon him by Dominion legislation.

It was further argued on behalf of the prisoner that we ought not to construe section 785 of the Code as giving the magistrate power to try an offence committed outside of Halifax county, because at common law a prisoner must have been tried in the county where the offence was committed.

The obvious answer to this is that the language of the section being plain and unambiguous, we are bound to give effect to it. Besides, why should we presume that parliament did not intend to permit a prisoner to be tried in any county other than that in which the offence was committed, even with his own consent, when, by section 640 of the Code, every Court of criminal jurisdiction is given power to try, without his consent, any offender in any county wherein he is arrested or in custody, for any offence wherever committed provided it was committed within the province where the Court sits.

Moreover, the statute law of England affords a number of instances in which Justices of the Peace were given powers, under certain circumstances, not only to try offences committed without the limits of their county, but to exercise judicial functions while sitting in some other county

than that for which they were appointed. See 3 Burns Justice, 13th ed., pp. 124-128.

For these reasons we think the prisoner is not entitled to be discharged.

Discharge refused.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 15TH, 1908.

THE NEW YORK HERALD COMPANY v. THE
OTTAWA CITIZEN COMPANY, LIMITED.

Trade-mark — Infringement — Validity — Comic Section of Newspaper — Sale in Canada without Copyright — Effect of a Subsequently Registered Trade-mark Consisting of Title of Comic Supplement.

CASSELS, J.:—The plaintiffs in this action sue the defendants for an alleged wrong on the part of the defendants in infringing the trade-marks of the plaintiffs.

There is little dispute as to the facts in question.

On the 6th July, 1907, the plaintiffs registered in the proper office and obtained the certificate of registration required by the statute of a specific trade-mark consisting of the words "Buster Brown," to be applied to the sale of comic sections of newspapers, etc.

On the 15th July, 1907, the plaintiffs registered in the proper office and obtained a certificate of registration required by the statute of a specific trade-mark consisting of the words "Buster Brown and Tige," to be applied to the sale of comic sections of newspapers, etc.

"Buster Brown" is not an ordinary youth generated as other lads, but was conceived in the office of the plaintiffs in New York in the year 1902.

He was a progressive youth of a saintly countenance and apparently born with such a superabundance of mischievous tendencies as required at a very early age the addition to his ménage of a dog called Tige, who could assist him in his pranks.

From 1902 onwards the New York Herald in their Sunday edition, as part of the comic section of their paper,

published a serial illustrated story of "Buster Brown" and his dog "Tige."

These comic sections were received over a considerable portion of the world by the manly youth with great eagerness, and while they may have had a tendency to make the lives of parents blessed with boys slightly more unhappy they became a lucrative source of revenue to the Herald.

If the trade-marks in question are the valid subject-matter for a trade-mark I think the plaintiffs entitled to them. I do not think the prior use of the name as detailed by the witness Epstein during the slight lapse of James Crossley from inebriety to sobriety sufficient to invalidate the trade-marks.

Neither can I agree with Mr. Ewart's contention that Buster Brown must be considered as a real personage. If it had been George Washington or Napoleon, or any other distinguished person, of course anyone would have had the right to publish new tales of pranks when these distinguished personages were youths. But Buster Brown is of an entirely different conception.

I have read over the cases cited and the argument, and a great number of other cases.

It has to be borne in mind that this action must be determined by the sole question whether or not the trade-marks are valid, and whether the defendants have infringed.

No question of fraud at common law or of passing off have been raised, nor would it be within my jurisdiction to try such cases.

In considering the various authorities cited it must be noticed that the greater number are not in reality based on trade-mark, although language has been used in some which is apt to mislead.

Many of them are cases in which the newspaper in question was the property of partners and the title passed as part of the assets of the business, but not because the ordinary English words distinguishing the title were capable of being trade-marks.

Other cases depend on fraud, the misleading of purchasers and obtaining the benefit of the business of the plaintiffs.

The case of *The New York Herald Co. v. The Star*, reported in 146 Fed. Rep. 204, affirmed by the Circuit Court of Appeals, is apparently a strong case in favour of the plaintiffs. I have a high regard for the opinion of these

Judges, but do not see my way to come to the same conclusion in this case.

The motion in that case was an interlocutory one, and the reasons given are scant.

Filed with me as part of his argument by counsel for the plaintiffs is a judgment of Mr. Justice Dowling of the Supreme Court of New York County in a case of Outcault v. Couplies, of date 21st June, 1907. I would gather from this judgment that in addition to the registered trade-marks in the United States the serial picture story has been copyrighted in the United States also. No copyright has been asked for or obtained in Canada.

From 1902 onwards the Herald has been selling their paper in Canada without the protection of the copyright statutes, and without complying with the requirements of the statutes. The result is that apart from questions of fraud (with which I have nothing to do) anyone in Canada could he publish the sheets of the Herald, including the names of Buster Brown and Tige.

In a very early case *Jollie v. Jaques* (1 Blatch. Circuit Ct., p. 618), decided by Mr. Justice Nelson, it was held that where in an action on copyright the plaintiff failed to make out title to his copyright, the question whether the Court will interfere to permit the use of the title of the work upon principles relating to the goodwill of trades cannot be entertained, as the Court has no jurisdiction of such a question.

"The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected the title goes with it, as certainly as the principal carries with it the incident." (Page 627).

See also *Kerly on Trade-marks*, 1901, p. 487, and case cited of *Clemens v. Belford*, 14 Fed. Rep. 728.

Sebastian on Trade-marks, 4th ed., 297.

There are numerous cases, such as the reproduction of Webster's Dictionary after copyright had expired, where it was held that the defendant having the right to publish the dictionary the right to the name followed.

"But there is no exclusive right to a trade-name on a publication which has been dedicated to the public without copyright, or on which copyright has expired." *Hesseltine on Trade-marks*, 1906, p. 205.

I would have thought it extremely doubtful, having regard to the terms of the Canadian statute as to trade-marks,

that these words Buster Brown and Buster Brown and Tige were the subject-matter of a trade-mark. But under the facts of the case they become public property so far as this case is concerned.

I think the action must be dismissed with costs, to be paid by the plaintiffs to the defendants.

DOMINION OF CANADA.

SUPREME COURT.

JUNE 16TH, 1908.

REX v. LEFRANCOIS.

Coram. GIROUARD, DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

Government Railway — Negligence — "Public Work" — Liability of Crown.

On appeal from the Exchequer Court of Canada.

GIROUARD, J.:—If the small portion of the railway in question in this cause is not an "extension" of the Intercolonial Railway, within the meaning of section 67 of 54 & 55 Vict. chap. 50, then I do not know what it is in so far as the Dominion Government is concerned. I quite agree with my brother Davies.

DAVIES, J.:—This appeal from the Exchequer Court raises the simple question, whether a small part of the Grand Trunk Railway connecting the eastern and western parts of the Intercolonial Railway, and about a mile in length, is an extension of the Intercolonial Railway within the meaning of those words in section 67 of 54 & 55 Vict. chap. 50?

The Government, under an agreement entered into with the Grand Trunk Railway Company, confirmed by statute, possesses powers and rights over this section of the Grand Trunk Railway line: "In perpetuity and free from charge to run their trains and engines separately or combined and as frequently and at such times as the character and extent of the traffic may require under the reasonable rules and

regulations of the Grand Trunk Railway Company, and under the direction of the officials thereof, between Hadlow and Point Levis Station, to and from places between these points in the yard at Point Levis and to and from and beyond that station."

For all practical railway purposes this little section of the Grand Trunk Railway is part of the Intercolonial system. Without running rights over it, an Intercolonial train could not pass from Montreal to Halifax or from any intervening points east or west of the section in question.

Section 67 of 54 & 55 Vict. chap. 50, reads as follows: "All railways and all branches and extensions thereof and ferries in connection therewith, vested in Her Majesty under the control and management of the minister and situated in the Provinces of Quebec, New Brunswick and Nova Scotia, are hereby declared to constitute and form the Intercolonial Railway."

The Intercolonial Railway is admittedly one of the public works of Canada, and, if the section in question is an extension of that road within the meaning of the section just quoted, that determines the appeal.

"The running rights secured in perpetuity and free of charge over the section may, I think, very well be said "to be vested in the Crown under the control and management of the minister."

It is not necessary that the rights of the Crown should be exclusive. The mere fact that its rights over the section are held and enjoyed concurrently with the Grand Trunk Railway Company and subject to the reasonable rules and regulations for its user by both railways cannot, I think, exclude it from the section quoted. The perpetual and free exercise of running rights over it are secured by virtue of the agreement quoted and are vested in the Crown and make it to all intents and purposes practically an extension within the statute of the Intercolonial Railway.

I think the appeal must be dismissed.

IDINGTON, J.:—The respondent's husband, it appears from the pleadings and particulars, was killed in consequence of a train despatcher of the Intercolonial Railway giving conflicting orders which brought about a collision of two engines of that road, on one of which engines deceased was a fireman.

The collision took place on a part of the Intercolonial railway system that runs over a road owned by the Grand

Trunk Railway Company, and over which the Intercolonial had perpetual running rights free of charge which were subject to the regulations that the G. T. R. Company owning the road might make from time to time.

It is urged for the appellant that it cannot be said the accident occurred on any "public work" within the meaning of the statute 50 & 51 Vict. c. 16, s. 16 (c).

I cannot agree, I think it was on a part of "a public work" such as referred to in the said Act.

We must apply the plain or ordinary sense of the words and then we find that it is not the real estate title to any part of the roadbed or track thereon that has to be thought of at all, but the work, that "public work" which is being carried on over that road bed owned by somebody else leased or used by virtue of some right for the public purposes of a great public work for which respondent is responsible, and was intended to be held by the Act in question fully responsible in respect of such happenings as those now in question.

I think the appeal should be dismissed with costs.

MACLENNAN, J.:—I agree in the opinion stated by Mr. Justice DAVIES.

DUFF, J.:—Having regard to the previous decisions of this Court, the phrase "on a public work" in s. 20, s.s. (c) of "The Exchequer Court Act" must, I think, be read as descriptive of the locality in which the death or injury giving rise to the claim in question occurs. The effect of those decisions seems to be that no such claim is within the enactment unless "the death or injury" of which it is the subject happened at a place which is within the area of something which falls within the description "public work." *Paul v. The King* (38 Can. S. C. R. 126), and the cases there cited.

But, adopting that view, I do not think it is taking any unwarrantable liberty with the language of the "Government Railways Act" to hold that the short piece of track in question here is, in the circumstances, a part of the Intercolonial Railway as defined by s. 80 of that Act; and is consequently—as part of a Government railway—within the limits of a "public work."

DOMINION OF CANADA.

SUPREME COURT.

JUNE 16TH, 1908.

HEBERT v. NATIONAL BANK.

Coram, FITZPATRICK, C.J., DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

Promissory Note — Alteration without Knowledge of One of Two Joint Makers — Fraud — False Representations — Forgery—Ratification—Partnership.

Appeal from Court of King's Bench (Appeal Side), Quebec.

THE CHIEF JUSTICE (dissenting):—In September, 1903, the appellant entered into an agreement with one Roy to buy on joint account butter to be warehoused and held for a rise in the market. Roy was a manufacturer of and dealer in that article, and Hébert, the appellant, was a merchant tailor; they both resided at and carried on business in the town of St. John in the Province of Quebec, and were apparently on friendly terms. It was at the same time agreed that the money required to carry on the venture would be borrowed from the respondents on the credit of Roy and Hébert, the warehouse receipts for the butter to be given as collateral security for the loan, and Roy was authorized to make the necessary financial arrangements with the Bank. It was finally settled that the money would be advanced on their joint demand note. Roy represented to the Bank agent when the note was discounted that the warehouse receipts which the Bank was to receive and hold as collateral were in the possession of the appellant Hébert, whereas the latter assumed that they were transferred to the Bank in pursuance of his agreement with Roy. At that time Roy pretended that he had in his warehouse about 10,000 pounds of butter. The proceeds of the note were put to Roy's personal credit.

The controversy here arises out of the fact that when Roy came to the Bank with the demand note signed by himself and Hébert, Audet, the Bank agent, said that as the loan was being made for an indefinite period, it was neces-

sary to provide for the Bank interest by adding to the note the words "avec intérêt à sept par cent par an." Roy was then asked to see Hébert and get his consent to the necessary addition and he immediately left the Bank, ostensibly for that purpose, and returned in a few minutes professing untruly, as found by the trial Judge, to have seen Hébert and obtained the required assent, and he then and there altered the note by adding the words "avec intérêt à sept par cent par an." Subsequently, it was ascertained that a fraud had been perpetrated by Roy, that he had no butter in warehouse as he represented, that he did not use the money borrowed from the Bank to purchase butter, and that in a word he had grossly deceived both Hébert and the Bank. In the interval, and before that discovery was made, another note for \$1,000 made in the same way and for the same purpose had been discounted under similar circumstances with the same Bank, and altered by the addition of the same words. That note, however, was paid to the extent of \$900 by the appellant with a cheque received in payment of a sale of butter to one Bryce, and, as to the balance of \$100, by Roy; and when fully paid the note was sent by the Bank through the mail to Hébert, who destroyed it after having kept it in his possession for some days without a word of protest. I am of opinion that Hébert then knew of the alteration made in that note by Roy with respect to the interest and acquiesced in what had been done.

When some months later Hébert discovered the fraud practised on him by Roy in connection with the warehouse receipts, he obtained from the Bank a copy of the note now sued on and, without objecting in any way to the alteration by addition of the words as to interest, though his attention was specially drawn to it, he consulted his counsel and instituted criminal proceedings against Roy, not for forgery, but for having obtained his signature to the note on the false representation that he then had in warehouse 10,000 lbs. of butter. The respondents assert that Hébert did not then object to the alteration, but on the contrary, formally approved and ratified what had been done by Roy with respect to the addition of the necessary words to provide for the interest (as he had done impliedly with respect to the note for \$1,000) and undertook to pay the note now sued on. Subsequently, however, Hébert repudiated all liability on the ground that the note was forged, having been altered in a material part without his authority or consent and he

denied that he ever authorized, ratified, approved or confirmed what had been done by Roy to provide for the interest; hence this suit.

In my view the purchase of the butter was a joint venture, or a particular partnership contracted for a single enterprise (Art. 1862 C. C.), and Roy had a mandate to make an agreement with the Bank to provide for the interest on the money which he was authorized to borrow and which could not be got otherwise to carry on the venture (Art. 1851 C. C.). If instead of adding the words which were inserted in the note, Roy had simply given a joint undertaking verbally or in writing to pay the interest on the loan at 7 per cent., can it be doubted that Hébert would have been bound? Hébert explains the negotiations with the Bank with respect to the loan and the arrangement as to division of the profit or loss on the venture; interest, insurance, warehouse and other charges having first been provided for. I make this extract from his evidence:—

“Q. Veuillez donc dire dans quelles circonstances et pour quelles raisons vous avez ainsi signé et endossé ce billet?

R. Le 10 septembre dernier M. Roy est venu chez moi dans l'après-midi me dire que si je voulais enmagasiner du beurre, comme il en avait été question avant avec lui, que c'était le temps. Il m'a fait la déclaration qu'il avait à cette époque-là pour \$2,000 de beurre qu'il pouvait expédier à Montréal et toucher l'argent immédiatement.

Q. Qu'à avait-il ce beurre là? L'a-t-il dit?

R. Dans ses entrepôts, à St-Jean, dans sa manufacture de beurre, à ce qu'il m'a dit. En même temps, M. Roy m'a présenté un billet rempli au montant de \$2,000 pour que je l'endosse. J'ai refusé carrément, en disant à M. Roy que ce n'était pas de cette manière que j'entendais faire de l'entrepôt. Je lui ai dit qu'il fallait voir d'abord si la banque avancerait les fonds; que je croyais que cela se faisait autrement que cela. M. Roy m'a dit: “J'ai été à la banque et ils sont prêts à nous avancer les fonds pour enmagasiner le beurre de septembre et d'octobre.” J'ai dit à M. Roy: “Retournez à la banque et vous reviendrez demain; renseignezvous davantage. Mon impression est que la banque va vouloir avoir d'abord les recus d'entrepôt c'est une chose qu'ils exigent et un billet additionel, si nécessaire pour les garantir davantage, au cas où le beurre perdrait de la valeur pour se rattrapper sur le billet dans ce cas-là.” J'ai dit que

c'éta't là les conditions que j'entendais suivre. Le lendemain, après-dîner, M. Roy est revenue et m'a présenté ce billet-ci, exhibit A, en blanc, me disant que c'était dans le sens que j'avais compris la chose que la banque voulait que ca se passe. Il m'a dit qu'il avait été à la banque et j'en ai conclu qu'il avait vu le gérant, et il m'a demandé de remplir le billet.

Q. Dites-vous qu'il vous a dit que la banque voulait que ce soit comme vous aviez indiqué la veille?

R. Oui, que c'était comme cela que ca devait se faire et que ca devait être rempli comme je l'avais suggéré la veille. J'ai dit à M. Roy: "Comme cela vous avez pour \$2,000 de beurre?" Il a dit: "Oui." J'ai dit: "Vous avez cela en chiffres ronds?" Il a dit: "Que." J'ai dit: "Vous avez par conséquent 10,000 livres de beurre en entrepôt?" M. Roy a dit: "Oui."

Q. Ou cela?

R. Toujours ici à son entrepôt, à St-Jean. Sur cette réponse affirmative de M. Roy, j'ai dit: "Il faut maintenant s'entendre quant aux profits ou aux pertes s'il y en a. D'abord il va falloir assurer le beurre." M. Roy a dit: "Pour cette quantité-ci ce n'est pas nécessaire." Il a dit qu'il avait suffisamment d'assurance pour le couvrir; mais que si on en enmagasinait d'autre par la suite on prendrait de l'assurance. J'ai dit: "Combien allez-vous me charger pour le loyer de votre entrepôt? Je n'entends pas me servir de votre entrepôt sans rémunérer. Sera-ce au pied ou au mois ou au mille livres? Je ne connais pas des conditions-là." M. Roy m'a dit: "J'irai à Montréal et je m'informerai; je chargerai à peu près comme ils chargent à Montreal; mais ce ne sera pas grand chose dans tous les cas." J'ai dit: "Maintenant, c'est bien entendu que vous allez donner les recus d'entrepôt à la banque, et une fois les intérêts payés ainsi que l'assurance et les frais d'entrepôt. s'il y en a, une fois toutes les dépenses en rapport avec cette transaction payées, les pertes ou les profits devront être dévisés également 'entre nous.' C'est à cette condition-là que j'ai rempli ce billet-là à demande. Je l'ai signé et je l'ai endossé. M. Roy l'a signé et endossé aussi devant moi. Mais je me suis aperçu quand M. Girard, mon avocat, m'a dit d'aller chercher une copie de ce billet, qu'après que je l'eusse signé, et hors de ma connaissance, il y a eu d'ajouté sur le billet 'avec intérêt au taux de sept pour cent.' Je n'ai pas

eu connaissance de cela, je n'ai pas été consulté à ce sujet non plus et ce n'est pas moi qui l'ai écrit."

And again at p. 21:

"Q. Vous deviez être de moitié dans les profits?

"R. Profits ou pertes."

And p. 22:

"Etant donné la société que vous avez faite avec M. Roy, vous avez signé ce billet-là pour participer dans les profits qui pouvaient être réalisés sur l'enmagasinage du beurre?

R. S'il y avait pertes ou profits après que toutes les dépenses étaient payées, on divisait également dans l'une ou l'autre. Le beurre pouvait être vendue le lendemain si on voulait, à la première occasion favorable qu'on aurait trouvé."

From this I conclude that Roy and Hébert were undoubtedly partners in the purchase of this butter and there was undoubtedly an agreement to share the losses or profits of the venture which was to be financed by money obtained from the Bank by Roy on their joint credit. To get the loan, under the circumstances, for an indefinite period, Hébert knew that interest must be provided for, and Roy had authority to bind both with respect to the payment of this interest, and an alteration of the note by the addition of words to provide for the payment of interest on money advanced for the benefit of the partnership is not, under the special circumstances, a fraudulent alteration which constitutes forgery.

Now, as to subsequent adoption and ratification. The fact that a note for \$1,000 was given under similar circumstances and altered in the same way is very material. That note was paid in part by Hébert, and it subsequently came into his possession; so it is impossible to believe that he did not see the alteration by the addition of the words as to interest. When he called at the Bank to make a copy of the note now sued upon, Hébert saw the similar alteration in this note and without protest undertook to pay it. Here are his words, as given by witness:

Page 83: M. Hébert a dit: "C'est mon billet, je le reconnais; je vous paierai mais M. Roy en paiera la façon. Je vais le faire arrêter aujourd'hui même." M. Hébert a ajouté: "La banque ne perdra pas un sou; je vais le payer, et je vais faire arrêter M. Roy aujourd'hui même."

Page 84: Il a dit: "Que sert-il à la banque de me faire les frais d'emprunter sur ma propriété poud un mois ou un mois et demi; lorsque je vous assure que le premier juin je paierai mon billet." J'ai dit à M. Hébert que j'allais en parler à M. Dorais, le gérant, et que j'étais convaincu que la chose allait lui être accordée que c'était raisonnable. Il a ajouté que sa femme était peinée de voir qu'il était obligé de payer \$2,000; qu'il avait une nombreuse famille; qu'il n'était pas riche, et qu'il connaissait ce que c'était que le gagner de l'argent. Il a dit: "J'ai dit à ma femme: "Tu ne penses pas qu'on a \$2,000 à retirer; de sorte que notre position se trouvera la même."

I would confirm because in my opinion there is sufficient evidence to shew that the alteration by addition of the words necessary to provide for the payment of interest on the loan made for the joint benefit of Roy and Hébert was made with authority, and to conform to the original contention of the parties and that the joint maker subsequently agreed to it.

INDINGTON, J.:—The appellant says he was asked by one Roy in September, 1903, to endorse for him a note of two thousand dollars to be discounted with respondents at St. Jean in Quebec, where the parties live, and to be secured by warehouse receipts covering ten thousand pounds of butter estimated worth at least twenty cents a pound.

He says the arrangement was finally agreed to between him and Roy on this basis, and the further understanding that he should be compensated for his endorsement by getting half the profits on the butter when it might be realized on later, and he also suffer half the loss if any.

This made it a joint venture, but nothing like a general partnership was thought of, though possibly future similar speculations may have been contemplated by appellant as possible.

He drew up a demand note and signed it jointly and also endorsed it jointly with Roy, whom he entrusted with it, and also the carrying out of the giving to the Bank the promised warehouse receipts. He saw no more of Roy on the subject and always supposed until the following November that the Bank had got and held the warehouse receipts. Then the Bank agent surprised him by calling upon him for the warehouse receipts and explaining that Roy had put the transaction through with the Bank by representing that

Hébert was to get and hold the warehouse receipts as security for both himself and the Bank.

Roy was enabled by this double fraud to get the money without the security of warehouse receipts.

His story is that Hébert signed merely for accommodation, never demanded security, never asked compensation for endorsement or joining in the note, and that the Bank never asked for nor were offered any security but that of Hébert signing.

He says future possibilities of speculation may have been spoken of between him and Hébert, but they had no relation to this business.

The line of reasoning upon which the Courts below proceed renders it necessary the foregoing evidence should be prominently borne in mind.

The note as made in Hébert's handwriting was found by him in the following April to have been altered by Roy adding the words, "with interest at seven per cent. per annum."

This alteration, the Bank agent and Roy agree, came about by reason of the suggestion of the agent that as it was a demand note it should bear interest on the face of it.

The agent says Roy at once acceded to the suggestion when made and left the Bank to get Hébert's sanction to it and returned in fifteen minutes or half an hour with the note thus altered. In one way he puts it as if Roy had reported on his return that Hébert had expressly assented to this particular alteration, but in another, and when repeating the words that passed, he puts it as if he had simply taken Roy's word that the bill was all right now.

In my view there is no difference under the circumstances in question here.

The appellant swears Roy never saw him on the subject or spoke to him on the subject of alteration.

Roy says that on the occasion of presenting the note to be discounted the appellant was at the Bank and had left before the agent had observed the omission to provide in this way for the interest, but instantly it was mentioned he followed and caught Hébert at or before reaching the pavement just outside the Bank, and explained what the agent had said as to interest, got Hébert's instant assent to the change being made, returned inside and in the agent's private office and his presence wrote the alteration.

All this circumstantial but somewhat improbable story of getting and acting on the authority of Hébert in the manner just related is denied by both the agent and Hébert.

The Courts below seem to have discredited Roy. The learned trial Judge proceeded on the assumption that the business being a joint one, Roy had an implied authority, and that Hébert after he had knowledge of the alteration acquiesced therein and recognized his responsibility and promised the respondent to pay the bill. The only Judge in appeal who gives reasons does not hold that he consented, but that the whole question was had he acquiesced? And he finds he did.

These several positions are taken by respondent here and also that Roy professing to act as agent or on behalf of Hébert as agent, his acts could be and were ratified.

The Bank never looked upon appellant in any other light than that of a mere surety, as Roy had represented and still represents him.

How can we impute to the parties for the purposes of this case that relation which is denied by him whose act is being inquired into?

How can we find in truth acted or represented he acted as an agent in making the alteration?

In the first place he in reality only said "tout correct," and the agent accepted his word. That did not imply he had the authority to write the alteration. It rather implied in the face of what had preceded that Hébert had finished the writing.

In the next place he was doing nothing but simply completing the fraud, which is the essence of every forgery, either of making or altering, and implies a representation that it is the act of another or done by the express or implied authority of another.

To adopt such a refinement as suggested, and is required, in order to impute to the act in question the nature of agency, in order that the rules relative to the ratification of an act of supposed agency might apply and thus escape the consequences of holding this to be a forgery, would be to go beyond any case I have seen or principle of any case that exists, and do much to break down the useful rigour of the law maintained so long for the protection of business men.

No doubt Roy was afraid to disturb appellant again lest doing so would lead to inconvenient inquiries or a possible meeting of the agent and Hébert.

Let us now see exactly what the appellant did thereafter and try to assign to it only its true legal weight.

The appellant had under consideration the prosecution of Roy, for the fraud alleged in relation to the representations as to the warehouse receipts and desired a copy of the note.

He went to the Bank and got a copy there.

On this occasion the accountant of the Bank tells that the appellant, even after he had, as accountant infers, seen the alteration, used expressions indicating his intention to pay the note.

No Court, I should hope, would hold him liable upon that evidence alone even if it stood quite unimpeached, but here it is absolutely contradicted, and as it stands does not seem at all the probable result of a man who appreciated the discovery he had made and understandingly intended to give that effect to the words imputed to him that is now claimed ought to be given. Acquiescence and ratification must be founded on a full knowledge of the facts.

This was on the 4th April or thereabout.

The same witness relates that ten days later, as he and appellant returned from Court where Roy had been up for examination on the charge of false pretences laid by the appellant, he asked him (the accountant) if he would be good enough to ask Mr. Dorais (meaning the then agent of the Bank) if he would wait until the first of June for payment. He alleges appellant referred to some life policies he had as falling in then.

There was no assent or promise surely in this interrogative conditional remark. The utmost that can be said is he may have had by that time a recognition of the facts. This witness says he reported this query and more as to the policies needless to repeat here, and explained to Mr. Dorais he had better see appellant for himself as the time asked would not be long to wait.

Dorais, the agent, pursuant to this went next day and saw appellant at his shop and as what he relates, if not all, is the strongest thing which appears to be relied on as indicative of an assent by appellant after he had seen or known of the alteration. I copy here from his evidence its material parts:

“Le soir même, ou le lendemain je suis allé voir monsieur Hébert dans son magasin, dans la ville de St. Jean,

et là monsieur Hébert m'a dit qu'il avait une police d'assurance qui devenait due dans le mois de juin. Il m'a dit: 'Si la banque voulait m'attendre jusqu'à ce temps-là, cela m'éviterait les dépenses' d'une hypothèque ainsi que les dépenses d'une quittance. Il m'a alors dit que si la banque voulait lui donner une chance et l'attendre jusqu'alors, il nous paierait. Là-dessus je ne lui ai pas donné de réponse affirmative. . . .

"Q. Avez-vous eu d'autres conversations avec le défendeur Hébert au sujet de ce billet-là, après cette date-là, ainsi qu'au cours des procès que M. Hébert a eus avec M. Roy, alors qu'il a fait arrêter ce dernier?

R. Non, mais j'ai vu M. Hébert plusieurs fois au bureau, avant l'arrestation de M. Roy. A partir du mois de janvier ou du mois de février, j'ai eu plusieurs visites de la part de M. Hébert. Il a même été question dans le temps d'acheter les garanties que nous avions. M. Hébert m'a dit en différentes circonstances, 'quand la banque voudra être payée elle sera payée.' "

All these promises preceding the arrest of Roy of course go for nothing, as no one pretends now, except possibly Roy, that Hébert had the slightest knowledge of the alteration before April.

The respondents are thus reduced to depend on a proposal made subject to a condition and never accepted or assented to.

I am at a loss to know how these expressions can be twisted into any assent such as the Act requires; or even if ratification was permissible to render a void instrument valid.

Suppose such a proposition had been made to Roy by appellant after the agent had required an alteration and Roy had reported it to him before altering as the condition of his consent, could the agent take from Roy and hold a bill altered in his presence by virtue of no greater authority than implied in such a question without first yielding an acceptance of the terms? Surely no one could venture to claim so. Yet this is that in substance.

Calvert v. Baker, 4 M. & W. 417, is a case of a defendant whose acceptance had been so altered as to place of payment from being at his house to some place else. His solicitor wrote for him after it was due and he fully realized the change, and ended, "He has been prepared for payment and the party may have his money by calling at Bulbrook." It was held this was not such an acknowledgment as would

support either the bill or a claim for account stated, but was a mere conditional proposal. That case illustrates what I mean as to a conditional offer.

The case of *Perring v. Hone*, 4 Bing. 28 (in 1826) is valuable here by reason of its having arisen out of a note given for a partnership liability, and which was intended to have been joint and several, but was written only as joint when defendant signed, and altered to conform to words used in one, of which it was part renewal, and which was joint and several. The defendant on its falling due was asked by letter to pay his joint and several note.

He replied that the communication should have his earliest attention.

The Court held that the defendant was not liable. Best, C.J., in his judgment remarks, "giving attention to a matter is a very different thing from giving assent."

There was no question of forgery, for all was done apparently in good faith, in short a case where ratification could legally have been given.

In my view of these facts I might well rest here, but the case suggests the desirability of a full examination of the law, which with great respect I submit has been quite misapprehended.

The Court below, so far as appears, relied solely on an American text book. Daniel shews that English and American cases differ. Certainly American cases exist widely different from the results this Court has reached heretofore on the subject of ratifying forged bills of exchange.

Moreover our law resting on English and Canadian authorities has been codified, in language appropriate thereto, which, as a rule, is not identical with such codification as arrived at in some of the United States. We must be guided by ours, now known as The Bills of Exchange Act, R. S. C. 1906, C., of which ss. 49 and 145 are identical with ss. 24 and 63 of the former Act, under which this case falls. For convenience I will refer to the sections as they now stand.

The first, and for this case, the material part of s. 145, is as follows.—

"145. Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided. except as against a party who has himself made, aut'orized, or assented to the alteration. and subsequent endorsers."

It is upon getting us to give the words "assented to" therein such an extensive meaning as they have not been given yet in England or Canada that the hope of respondent lies.

Some formidable difficulties stand in the way. In the first place,* for the reasons already stated, there was no assent and none in the way at all events of consent which is to be implied in what I will for the present and as a convenience call the primary meaning of assent as the law required or had in view.

In the next place, if the word "assent" is to be given a wider and I will call secondary meaning such as involved in ratification, then this was clearly a forgery and incapable of ratification. I will deal with the primary meaning first and later take up the secondary.

It is well to observe here that in this quotation from s. 145 no new law is enacted. It is but a declaration of the law as it existed for at least a hundred years prior to the Bills of Exchange Act.

The case of *Master v. Miller*, 4 T. R. 320, Smith's L. Cases, 11th ed., vol. 1, p. 767, puts beyond all doubt that in law a material alteration of a bill of exchange after acceptance rendered it void.

This rule was not limited to a bill of exchange. It extended to or had been extended long before this legislation to all written instruments. It was not confined to an alteration made before issue of bill, or the coming into operation of the contract or instrument.

The case of *Davidson v. Cooper*, 11 M. & W. 778, where no explanation was offered, leaves us to infer the like results if alteration take place after the due date or after the right of action had accrued.

It was not even necessary that it should alter the contract.

Each of these propositions is, I submit, supported by the decision which was in regard to the erasure of a number on a Bank of England note, in *Suffeld v. Bank of England*, L. R. 9 Q. B. D. 555 (1882) in the Court of Appeal, which was a case in regard to the erasure of a number on a Bank of England note.

The statement of Chief Justice Dallas in the case of *Sanderson v. Symonds*, 1 B. & B. 426, that "the original rule was not intended so much to guard against fraud as to insure the identity of the instrument and prevent the

substitution of another without the privity of the party concerned," is quoted in that case by Cotton, L.J., with approval.

Such a decision in April, 1882, as *Suffeld v. Bank of England*, by the Court of Appeal, about four months before the passage of the Bills of Exchange Act, 1882, from which ours is taken, sheds a flood of light on the meaning to be attached to the words "altered" and "alteration" in s. 64 of that Act, which is identical with s. 145 of our Act as above quoted, unless we can infer, for which we have no warrant, that a radical change of the law was intended by the Act.

Can there be any question that the meaning of these words, set in the context they are, was intended to be anything but the law that had thus recently been declared?

Then we find in the several opinions of the eminent Judges who agreed in that decision not only no fault found with the rule there quoted from Pigot's case, 11 Rep. 26, but it is treated as the modern root of the law, Jessel, M.R., in his judgment asserting it never to have been doubted.

The quotation thus both explicitly and tacitly affirmed is as follows: "That when any deed is altered in a point material by the plaintiff himself or by any stranger without the privity of the obligee, be it by interlineation, addition, raising or by drawing of a pen through a line or through the midst of any material word, the deed thereby becomes void."

We find moreover in the plea used, to set up this defence of alteration, that the allegation in the approved forms was invariably that it was so altered "without the consent of the defendant."

We find text-writers such as Mr. Leake treat of it under the head of discharge, and we find the Bills of Exchange Act, 1882, classifies it under the head of discharge, and our own Act treats of it under the head of discharge of the bill.

In face of all that, must we not say this note was void and appellant as a maker of it discharged at least from 11th of September, 1903, until 4th April, 1904.

And how could he then become bound again by something then said or done, unless it came up to the full meaning of a ratification?

In this application of what I have called a secondary meaning or that of ratification, if as I will for the present assume such a thing is within the intended scope of the

words "assented to" in this section, the respondent is face to face with the rule of law that forgery cannot be ratified.

The case of the *Merchants Bank v. Lucas*, 18 S. C. R. 704; *Cameron's S. C. Cas.* 276, binds this Court. There the defendant's firm name had been forged by a brother of a member of the firm who recognized it as a forgery, and at last promised to send next day a cheque for the amount.

The Court of Appeal for Ontario held that the defendants there were not liable, that a forgery could not be ratified, and that there was not enough shewn to create an estoppel, and thereby the defendants were discharged. This Court upheld that.

The case here is as against the appellant infinitely weaker than that case was against the defendants, unless we distinguish forgery by alteration as different in effect in this regard from a forging of the signature. Is there in principle room for such a distinction? I cannot see how, if due regard be had to the essential nature of the things dealt with. Why discriminate between things so essentially requiring the same treatment in laying down rules for the guidance of men?

At common law forgery was defined to be the fraudulent making or alteration of a writing to the prejudice of another man's right.

This remains good law though supplemented by statute, and is applicable to the making or alteration of bills falling respectively within ss. 49 and 145 above referred to.

Moreover we have to bear in mind that when the English Bills of Exchange Act, 1882, from which ours is taken, was passed, the case of *Brook v. Hook*, 6 Ex. Div. 89, in 1871, had declared that forgery could not be ratified.

This Court in like manner had immediately preceding our Bills of Exchange Act, 1890, decided the case of the *Merchants Bank v. Lucas*.

Now let us consider both sections together and see if there is any room for distinction in this regard. Each of these sections respectively declares the forgery or alteration void.

The language is just as strong in law in the one case as the other. The subject about which it is used being different makes all the difference there is.

In both cases there are exceptions to the absolute operation of the voiding words, and these exceptions when ex-

amined in detail and viewed in light of the history of the law on the subject, have the same general purposes in view.

In s. 49 the exception turns upon the word "precluded," which Chalmers in his comment on it tells us was substituted in the passing through committee of the English Act, from which ours is taken, for the word "estopped," which had not in Scotch as in English law a technical meaning.

Have we not thus a key to the secondary meaning to be put upon the words "assented to" in the s. 145?

There are also provisoes following the main part of each section. These seems to have for a common purpose the protection of the innocent holder and to rest upon what is essentially, at bottom, but a recognition of that which is akin to the principle of estoppel and in truth in many cases but that principle itself and a statutory declaration defining limits of application thereof, which mercantile experience had developed as found necessary in the business world.

It is to be observed that there is not in regard to alteration an express provision in s. 145 like unto that which there is in s. 49 in regard to a forged signature, for preserving rights springing from "ratification of an unauthorized signature not amounting to a forgery," Why is this so? Is there no substitute for it?

It seems to me that the words "assented to" are apt words to expressly cover not only the use or meaning of the words consented to which imply a privity to the Act itself, but also the cases of ratification of an alteration made by an agent or one professing to act as an agent, in any innocent way. I say in any innocent way because we find in the section relative to a cognate subject this expressed, and we cannot impute to the legislature an intention to carry in such words as we are interpreting what was regarded up to that moment as utterly repugnant to the policy of the law.

Giving the words "assented to" this application we harmonize the otherwise apparently discrepant purposes of the two sections when dealing with that which in either case is void and so declared.

There can be no more reason for rehabilitating the one void act than the other. Nor can there be any reason for making that rehabilitation more extensive or comprehensive in the one case than in the other.

The principle of acquiescence relied on below running through many cases when attempted to be applied to validating a forgery never has been effective in itself. What has

been, and short of a new agreement, has alone been made effective in such cases, is where the acts or words, or either, of the party having a right to repudiate the forgery, have led another party to rely on such acts or words and act on the faith thereof.

Unless such estoppel could be shewn there could be no dependence put upon ratification of a forgery before the Bills of Exchange Act, and certainly it never was intended thereby to imply differently by using the words "assented to" therein.

The fraudulent purpose which is the essence of forgery is here only too apparent.

It has long been laid down that the ratification of a forgery cannot be in law. The reasons assigned therefor have varied. The existence of the rule has even been questioned.

It has been determined in this Court affirmatively. To apply that affirmation to one form of forgery and deny it to another would seem like making a travesty of legal principles.

In any form this case presents or in which it can be presented to escape this rule, we must either ignore the forgery, self confessed as it stands, or find that an alleged promise not relied upon, not accepted, or shewn to have been acted upon, is an estoppel that bars the right to appeal to the rule.

I would for a clear statement of the rule and reasons of or for the same refer to Daniel on Negotiable Securities, 5th ed., s. 1352 (b), which follows a review of English and American cases.

I think the appeal should be allowed and the judgments in the Courts below reversed with costs in all and here to the appellants.

DAVIES, J. (dissenting):—I agree with the Chief Justice that this appeal should be dismissed. I prefer, however, not to rest my judgment upon the ground of the existence of an implied authority on Roy's part arising out of his special partnership relations with Hébert to make the alteration in the note, but upon the ground that when Roy took the note to the respondent bank to have it discounted and added the words "*avec intérêt à sept par an*," he did so claiming to have had the authority of his co-maker, Hébert, to add these words, and that Hébert subsequently assented to the alteration and so confirmed Roy's representation of authority.

If subsequent assent to an alteration of a note made with full knowledge of the facts is sufficient to hold the person so assenting to his liability on the bill, I am of opinion that the evidence is amply sufficient in this case to find such assent and I concur in the Chief Justice's reasoning on this point.

Then, with respect to the law of the case, I think the case of *Merchants Bank v. Lucas*, (Cameron's S. C. Cases, p. 276), relied on by the appellant, does not govern or apply to the facts before us. That was the case of a simple forgery of a man's name to a note and an attempt to hold the person whose name was forged liable because of a subsequent promise to pay it. Here we have a note admittedly signed by the party sought to be charged, but alleged to have been altered by his co-maker, but so far as the holder is concerned, altered professedly by Roy under the authority of the party sought to be charged. As is said in appellant's own factum, in stating the circumstances under which the respondent's manager discounted the note:—

Looking over the note he, the bank manager, noticed that there was no mention of interest on it. So he asked Roy to call upon Mr. Hébert, the appellant, in order to have the interest mentioned on the note. Roy left the bank to go to Hébert's, apparently, and came back 15 or 20 minutes later with the same note with the words "*avec intérêt à sept par cent par an*" added to the wording of the note and without any possible doubt most evidently of the hand-writing of Roy himself.

Upon Roy's declaration that the appellant had acquiesced to the addition of the note, the manager, Mr. Audet, accepted his word as to this, just as he had accepted his word concerning the warehouse receipts.

The ratification or assent relied upon here is that of an act done by a person professing himself to have been for the purpose the agent of the person subsequently ratifying it. The distinction between such an act and that of a mere forgery is distinctly pointed out in the case of *Merchants Bank v. Lucas*, above referred to, in the report of the reasons for their judgment given by the learned Judges of the Court of Appeal for Ontario, and to be found in 15 Ont. L. R. at page 600, and affirmed in this court on appeal.

In the case of *Brooke v. Hook* (L. R. 6 Ex. 89), cited and relied upon in *Lucas's Case*, Chief Baron Kelly, in delivering the judgment of the Court, at page 100, says:—

“In all the cases cited for the plaintiff the act ratified was an act pretended to have been done for or under the authority of the party sought to be charged; and such would have been the case here, if Jones had pretended to have had the authority of the defendant to put his name to the note, and that he had signed the note for the defendant accordingly, and had thus induced the plaintiff to take it. In that case, although there had been no previous authority, it would have been competent to the defendant to ratify the act, and the maxim before mentioned would have applied.”

Apart from authority respecting the law as it stood before the codification of the law on bills and notes, I am of opinion that the subsequent assent of the defendant to the alteration is sufficient to bind him under the Bills of Exchange Act of 1890, now chapter 119 of the Revised Statutes of Canada, 1906. Section 49 of this revised Act deals with a forged signature to a bill or note and provides that nothing therein shall affect the ratification of an authorized signature not amounting to a forgery; while section 145 deals with material alterations made in such an instrument. In this latter section it is declared with respect to patent material alterations that where a bill or acceptance is materially altered without the assent of all parties liable on the bill the bill is voided, except against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

Now, here are three specified and distinct exceptions from the conditions under which a material alteration is declared to avoid the bill;—1st. Where the party sought to be charged has himself made it; secondly, where he has authorized it to be made, and, thirdly, where he assented to it having been made.

It has been argued that the assent must be an assent given previous to the alteration, or at any rate previous to the issue of the bill or note.

I do not see any reason or justification for putting such a limitation upon the meaning of the phrase used in the section. The first two exceptions may well relate to an alteration made before the issue of the note, but are not necessarily confined to such an antecedent period; the last

exception, it seems to me, was introduced for the very purpose of covering a subsequent assent to a previous alteration.

In section 49, relating to the simple forgery of a name to a bill or note, a proviso is introduced saying that nothing in the section shall affect the ratification of an unauthorized signature not amounting to a forgery.

It may be argued that section 145 is to be construed as only applying to alterations under the circumstances mentioned by the learned Judges who delivered the judgment in *Merchants Bank v. Lucas*, and in *Brook v. Hook*, that is, where the alteration was an act pretended to have been done for or under the authority of the party sought to be charged.

Even if limited to such cases (as to which I express no opinion), it is clear to my mind that it at least covers them and that this case is one of them.

I think the appeal should be dismissed.

MACLENNAN, J.:—I think this appeal should be allowed.

The first question is whether the addition made to the note was a forgery.

I think it was. The addition made was material. Originally the note contained no stipulation for the payment of interest, and was payable on demand. The alteration was the addition of the words "avec intérêt à sept par cent par an."

The relations of the parties were not such as to authorize Roy to make the alteration, without express authority. They were not partners. The appellant was merely an accommodation maker, for which it was agreed he should share the profit or loss on the sale of certain goods of Roy. Roy did not pretend to have authority to make the alteration. He pretended to go and get authority, and then pretended he had obtained it, and I agree with the learned Judges below that it was not true that he had, as he pretended, obtained authority.

The banker discounted the note, and nothing further happened until the beginning of April, more than six months afterwards, when the appellant went to the bank to obtain a copy of the note. During all that time the note was, in

my opinion, an undoubted forgery, and on the authority of the *Merchants Bank v. Lucas*, 15 Ont. A. R. 573, affirmed in this Court, 18 S. C. R. 704, incapable of ratification.

But it is argued that sec. 145 of the Bills of Exchange Act (1906), is applicable, and that certain alleged promises of the appellant, after he became aware of the alteration, have made him liable.

That section, so far as applicable, is as follows: "Where a bill or acceptance is materially altered, without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent endorser."

In what sense is this word alteration here used? The word itself is ambiguous. It may mean the doing of the act, or it may mean the act done. The statute speaks of an assent to an alteration. Does that mean assent to the making of the alteration, or does it mean assent to it after it is made? A bill to which three or more persons are parties is altered. One of the parties made the alteration, that is, did the act. He is not discharged, he remains liable. Another authorized it, that is, as before, authorized the doing of the act. Then comes another who has neither done the act nor authorized the doing of it, but has assented to it. Assented to what? Plainly as before, to the doing of the act. The word alteration must have the same meaning in all three cases, that is, the doing of the act, the making of the alteration.

The statute says, in effect, the bill voided except as against a party who has himself made, who has himself authorized or who has himself assented to the making of the alteration.

The use of the perfect tense also favours the same construction. The bill which the legislature declares to be voided, is a bill materially altered without the assent of all parties. Then it says that any party who has assented to that alteration is still to be bound. It is not any party who assents, but who has assented.

The statute in effect declares that a bill altered without assent is voided, but if altered with assent it is binding on him who has so assented.

The appeal should be allowed with costs here and below.

DUFF, J.:—The construction of section 145 of the "Bills of Exchange Act" presents considerable difficulty. Read grammatically the section would seem to enact that a material alteration of a bill has the effect of nullifying it as against all parties except the party who made it and such as, at the time of or before the making of it, had authorized or assented to it. But I do not think it necessary for the purposes of this appeal to decide whether that is or is not the true effect of the enactment. Assuming that, under it, an assent may in some circumstances take effect, though given after the alteration is a completed act, it by no means follows that such an assent would give validity to an alteration amounting to a pure forgery. The legislature appears (section 49) to have adopted the view of the majority of the Court of Exchequer Chamber, in *Brook v. Hook*, (L. R. 6 Ex. 89), that a forgery consisting in the false making of a bill is incapable of ratification—a view acted upon by this Court in *Lucas v. Merchants Bank* (Cam. S. C. Cas. 275). Having regard to the legislature's manifestation (in the section last mentioned) of its view of the policy of the law, it would, I think, involve an unwarranted expansion of the strict grammatical sense of section 145 to hold that a simple *ex post facto* assent can by force of that section give a legal effect to a fraudulent alteration amounting to forgery, and, apart from the enactment in that section, incapable of ratification.

With great respect for the opinions of those who take a contrary view, I am unable to escape the conclusion that the alteration in question here was simple forgery and (within the principle of the decisions referred to) legally incapable of adoption by the appellant as his act. Neither in making the alteration nor in negotiating the promissory note, did Roy intend or profess to act on behalf of the appellant. On this point the whole of the evidence is in a very narrow compass, and it shews plainly that, in negotiating the notes, Roy presented himself to the respondent bank as a borrower on the security of the appellant's indorsement, representing, at the same time, that the appellant held certain warehouse receipts as security against his liability as accommodation indorser. There was, at the time, no suggestion that Roy and the appellant stood to one another in the relation of partners or in any other relation implying that in the transaction Roy bore a representative character as regards the appellant. The agent who acted for the bank

in the business does not say that he received any such impression; nor, I think, could anything that Roy said or did—as related in the agent's testimony—convey such an impression. According to that testimony, Roy's conduct would I think, appear in this light only, that, on his own behalf, with a view to the negotiation of the promissory note for his own purposes, he had made the alteration required by the agent and that the appellant, as his accommodation indorser, had assented to it; or that he had procured the appellant himself to make it. That was a very different thing from professing that what he had done was done for the appellant and as the appellant's act, or for the joint behoof of himself and the appellant and as their joint act.

It seems equally clear, moreover, that Roy did not in fact, in making the alteration or in negotiating the instrument, intend to act for the behoof of the appellant or of the appellant and himself jointly. The appellant had, it is true, lent his indorsement on the understanding that the bank should be secured by a deposit of the warehouse receipts in furtherance of an adventure which Roy had proposed, and in which he supposed himself to be engaged as the associate of Roy. But the substratum of this adventure—the merchandise which was to stand as security for the loan and which was to be held and sold for their joint benefit—was a pure myth; and this proposal, a mere device on the part of Roy, to enable him, by the use of the appellant's indorsement, to obtain an advance from the bank for his own benefit.

Every act which Roy did—including the making of the alteration in question—from the time of his interview with the appellant, was done in furtherance—not of the mythical joint venture—but of this fraudulent design.

Roy's act in making the alteration in these circumstances, without Hébert's consent, and with the intent, moreover, of tendering it to the agent of the bank as made by Hébert or with his assent, bears all the characters of a forgery; and, in the view I have expressed, the subsequent sanction of it in fact by Hébert could not give it legal validity either as an assent within the meaning of the statute or (as a ratification) apart from the statute.

Appeal allowed, with costs.

DOMINION OF CANADA.

SUPREME COURT.

JUNE 16TH, 1908.

FARRELL v. MANCHESTER.

(ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.)

Company Law—Principal and Agent—Sale of Stock—Rescission—Laches.

The judgment of the Court was delivered by

IDINGTON, J.:—The lucid and comprehensive judgment of the learned trial Judge, now Chief Justice of New Brunswick, shews how the respondent company engaged an agent to sell stock issued or proposed to be issued by that company, and, as a consequence, was responsible for the material misrepresentations made by the agent. (See 3 E. L. R. 244).

So far as the company is concerned and its original liability to rescission arising from these causes and to refund the appellant the money received from him by virtue of such misrepresentation, the learned Judge's finding cannot be questioned.

I cannot agree, however, that the right of rescission was lost by delay.

The appellant, at a shareholders' meeting, on 26th January, 1904, had reason, for the first time, to doubt the truth of the representations made to him.

He soon saw the agent who had sold the stock and complained to him and demanded a return of his money. Then on the 5th of February, 1904, he wrote the defendant, Manchester, president of the company, to the same effect, attended a meeting on the 16th February, to demand his money back and tender a surrender of his stock, attended another time to repeat this in March, when the meeting failed to organize, and, on the 19th March, wrote a very long letter for the same purpose and to set forth what the agent's side of the story was. These tenders and letters brought no reply till a brief note of the 13th April, which I will refer to later.

The repudiation and right to rescission was asserted so promptly and so persistently pressed without eliciting any reply until 13th April, that I fail to see how respondents can

complain of delay in suing, at least till then. Contemptuous silence may be a fitting answer to a direct charge of personal fraud. But here, the complaint was of the conduct of an agent. It was the duty of the directors to have investigated. See remarks of Lord Hatherley, if authority needed, referred to later. It was the duty of the appellant to have awaited the result for a reasonable time.

The effect of delay or laches is stated in the case of *Lindsay Petroleum Co. v. Hurd* (5 P. C. 221), at p. 239, et seq., as follows:—

“Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief which, otherwise, would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by the Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.”

This was cited with approval by Lord Blackburn, in *Erlanger v. The New Sombrero Phosphate Co.* (3 App. Cas. 1218), at p. 1279, as follows:—

“I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide and must, therefore, be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.”

He also cited with approval from *Clough v. London and North Western Railway Co.* (L. R. 7 Ex. 26), at p. 35, the following:—

“We think that so long as he has made no election he retains the right to determine it either way, subject to this, that, if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind.”

And he adds:

“I think it is clear on principles of general justice that, as a condition to the rescission, there must be a *restitutio in integrum*. The parties must be put in *statu quo*.”

These quotations must be accepted as undoubtedly correct expositions of the law.

There has been no departure from these principles by any Court deciding any of the cases of shareholders repudiating, in such cases of fraud, the contracts they may have entered into.

In regard to the contracts of shareholders or subscribers for shares, the nature of the act enabling the companies, in such cases, to become incorporated or incorporating them, and the responsibilities assumed by virtue thereof, either to fellow-subscribers or fellow-shareholders or creditors of such corporate bodies, have all to be reckoned with in order that any attempted repudiation of a subscription for or acceptance of a share or shares may not be done to the unjust detriment of those third parties; or in conflict with the statutory obligations assumed by virtue of the subscription for shares or of acceptance thereof under the conditions that may have arisen before repudiation.

The statutory obligation does not exist in such a case as this. The appellant took no part in creating the company or issuing this new stock, but merely bought and paid in full \$3,000 for stock subject to no further call and repudiated the purchase when he found it had been induced by fraud. Neither creditor nor shareholder is entitled to look for further assistance. What then is the third party's right that is to be affected by a rescission? What is the injury to be done such an one? How, by any possibility, could there spring out of the delay from April to December, in this case, any wrong or deprivation that would not have been suffered

if suit had been brought in the former month instead of the latter?

The reason assigned for any distinction in regard to right of rescission between a contract to take shares and other contracts is well put by Fry, L.J., in *Re Scottish Petroleum Company* (23 Ch. D. 413), at p. 438:—

“As regards such contracts the legislature has interposed and has provided that they shall be made known in a particular way to shareholders and creditors; notice of them is given to the world. Now, the general principle is that no contract can be rescinded so as to affect rights acquired bona fide by third parties under it. It is true that the creditors and the other shareholders have not acquired direct interests under the contract, but they have acquired an indirect interest. The shareholders have got a co-contributory, the creditors have got another person liable to contribute to the assets of the concern. So that, although in the case of voidable contracts simple repudiation is enough, there must, in the case of a voidable contract to take shares, be a repudiation and something more before the winding-up commences.”

That relates to the contract to take shares. But what of the contract to pay for shares taken? The same reasoning answers there also.

But what of the cases where the shares have been paid up? There is no new co-contributory or obligation created by statute in favour of the creditor. The creditors stand, just as the creditors of the thousand and one others whose fortune, founded on fraud, has disappeared to the grievous disappointment of the creditors.

The case of *Re Cacher, Lawrence's Case* (2 Ch. App. 421), has been relied upon by both parties in the Court below and in the argument of the respondent before us.

With the greatest respect for the Court, I am unable to find how any support can be derived therefrom in this judgment.

The *Lawrence* case is presented to us in the respondent's factum, as follows:—

“In *Lawrence's Case* (2 Ch. App. 412), a delay of May to the 27th of September, being four months and eleven days, was held to be sufficient to deprive the appellant of any right he had to repudiate the shares.”

There is no question of winding-up in this case.

Being typical of other cases and arguments therefrom pressed by respondent's counsel, let us see what it means and

what foundation there is for it, or possible use to be made of it for laying a foundation to decide this case.

The facts which the report of the case presents are, that when the company was being promoted, in July, 1865, a copy of the prospectus was handed to Lawrence, probably pursuant to previous correspondence in anticipation of the project, that, on the 4th of September, 1865, he signed and sent in an application for 2,000 shares, paying a deposit of 10s. per share; that the company was incorporated and memorandum of association registered on the 11th of September, 1865; that on the 7th October, 1865, he received a letter of allotment of 2,000 shares; that, on the 14th of the same month, he paid the company's bankers a further 10s. per share, giving up his letter of allotment in exchange for the banker's receipt acknowledging his title to and promising delivery of certificate for such shares; that nothing more passed until 14th May, 1866, between him and the company; that on that date, he and his solicitor had in their hands the whole of the documents on which variance was relied for moving to be discharged from the register; that he could then have waived or rescinded, but, instead of repudiation, though knowing the register held out to the world, as a shareholder in and member of the company, allowed his son to hold communication with and influence the conduct of the directors on the footing of he (Lawrence, Senr.), being a shareholder. This was enough, Lord Cairns thought, to disentitle Mr. Lawrence.

What is the possible analogy between such a case under such an Act as the English Joint Stock Companies Act of 1862, and the facts set forth, and this case, under the New Brunswick Joint Stock Companies Act and the facts made to appear here?

It was in dealing with that May and September space of time that it put forth in respondent's factum as if, which it is not, the entire substance of the case and a test of time permitted after repudiation that Lord Cairns used in answering such contention as could be set up thereunder, the following language; I quote from pages 424 and 425 of the report:—

“In considering this part of the case it is necessary to bear in mind the general scheme of the Act of 1862. No company can, under that Act, obtain a limit of liability for its shareholders except by registering a memorandum of

association, which is the charter and limit of the powers of the company, just as the articles of association may be said to be its rules of internal government. A copy of these documents is to be forwarded to every member on his request, at a fee not exceeding 1s. When registered they bind the company, and every member of it, as if each member had executed a deed with covenants to the effect of the provisions which they contain. On the other hand, the test, and the only test, which other members and the outer world can have of the membership of any particular person, is the entry of the name of that person on the register as a member.

“In this register of members, Mr. Lawrence, by the form of his application for shares, expressly authorized his name to be entered, and he must have been aware that, upon this being done, he would be held out to the world as a member of the company, whatever the form or substance of its memorandum or articles. He must be taken, in my opinion, to have known, either that the memorandum of the association was prepared and accessible at the time of his application, or that it must be prepared forthwith; and that, in either case, both it and the articles must, in their very nature, be documents differing widely in form and, in all measures of detail at least, going beyond the prospectus; and, with regard to documents of this description, on the mode of framing, which, consistently with the prospectus, so much difference of opinion might well arise, it would, in my opinion, be contrary to the first principles of justice to hold that Mr. Lawrence was at liberty to remain wholly passive, content to trust to what was stated in the prospectus, and, while he knew that an authority to register his name and hold him out as a shareholder had been given and probably acted on, keeping himself in a position to ratify all that had been done if the company turned out prosperous, but for the first time to inquire and, if possible, to repudiate, should a financial panic come, or the speculation turn out unsuccessful.”

The language I have quoted exhibits, as usual for him who used it, such a comprehensive grasp of the whole subject matter in all its bearings, and clear exposition of the law applicable to the facts I have recited, that, if it fails to bring home to any one the wide distinction between that case and this, I cannot hope to do so by any language of my own, when the respective facts of each case and the leading

features of the respective statutes upon which each creation rested are borne in mind.

The beauty of the exposition is that, without dwelling upon any needless details, the lesson is so learned as one reads that the reader sees how to expand the application of it without adding useless words.

I have examined every case cited or that I have been able to find, to see if there ever was a case resembling this in its leading features, where a Court, whose authority would bind us, ever, merely because of delay between repudiation and action, refused relief to a shareholder whose shares had been fully paid up and who repudiated within a reasonable time, but have found none.

There are cases indicating the contrary view of the law. The case of *Kisch v. The Directors of the Central Railway Co. of Venezuela* (3 DeG. J. & S. 122, and L. R. 2 H. of L. 99, in appeal) shews that the plaintiff allowed, after knowing of the fraud, two months to elapse before he moved and six months after he might have known, if he had been diligent, and though a shareholder liable for the part unpaid on account of shares, yet on appeal the House of Lords thought little of the question of delay then set up.

The case of *Oakes v. Turquand* (2 E. & I. App. 325) sweeps out of the way, as authorities concerning us and calling for consideration on this point of delay, all those cases under the English Joint Stock Companies Act where an order for winding-up has been made or petitioned for; and the reasoning upon which it proceeds removes, in like manner, also all those cases wherein the shareholder had not fully paid up his shares, for no one could tell when the statutory obligation under those Acts in favour of creditors might, in the course of business, become operative, and hence the necessity for that promptitude so repeatedly urged as necessary for those repudiating or taking action to rescind, if they desired to escape the operation of that statutory obligation or to be just to those becoming entitled to invoke it.

Among many important differences there is the essential difference of far-reaching importance in this connection between the English Joint Stock Companies Acts and the New Brunswick Joint Stock Companies Act, that the register ever since 1862 was, in England, open to all the world, but in New Brunswick it was only open, as of right, to creditors and shareholders.

A man could not well complain of becoming a creditor on faith of any register where, until he became a creditor, he had no right to look at it.

There is exhibited in the drastic and comprehensive system of the English Act of 1862, and later Acts, a scope and purpose far beyond anything that appears in the limited field covered by the New Brunswick Act.

It is part of the scheme of the English Acts to work out the rights and liabilities of the subscriber for shares and those entitled to rely thereon, by holding the subscriber to the obligation he has undertaken, unless he adopt the special and speedy method of getting rid thereof provided by the Act.

Such cases as *Taite's Case* (3 Ex. 795) are only binding illustrations of time allowed for removal from the register by the means specified by the Act.

The same legislation or similar legislation creating similar conditions might give a value to such authorities which I do not conceive they have here where the conditions legislatively and in every way render the cases different from what we have to deal with herein.

There is no peculiar quality in a share, once fully paid up, and no future liability on it, whereby we can differentiate the consequences of fraud inducing sale of it, and right of rescission arising therefrom, and those consequences in relation to any other property.

There always has been and always will be, as one property differs from another, a variation in the proper measure of time to be allowed for repudiation, and following repudiation, for application to the Court to enforce it.

The perishable must differ from the permanent, and the chances of change in ownership and development must give rise to such varying conditions and consequent varying obligations as to render it impossible to lay down any uniform rule.

There is no greater right in a corporate body, as such, or in one of the corporators, as such, to be protected from suffering or inconvenience arising from disappointments that the fraud of servant or agent creates, than non-corporate persons have who endure the same.

The distinction made in some of the corporation cases arises from the greater risk run of injuring third parties.

The conditions that the cases of unpaid shares present, under the English Acts, are entirely different from the property in fully paid up shares.

I wish to refer to some cases illustrating my meaning and my understanding of the law in this respect when applied to company cases where the statutory provisions do not form a leading element in the questions to be solved.

Take the case of *Clarke v. Dickson* (E. B. & E. 148), where the dealing was not between the company and the subscriber for shares, but between private persons in relation to the buying and dealing with shares, when the contract of purchase was alleged to have been induced by fraud.

Lapse of time, though great, was not the special element that disentitled to relief, but the change in conditions was the bar on which stress was laid, and coupled with that was the dealing of the purchaser with the property.

The case of *Aaron's Reefs v. Twiss* (1896 A. C. 273), is another illustration in a different way.

There the company had of its own motion removed, for non-payment of calls, the name of respondent as a shareholder. The Act provided that a shareholder, in such case, remained liable for such unpaid balances of purchase of shares subscribed for.

The company sued for the balances, and the defendant set up the fraud and succeeded, though he never, in fact, repudiated, except by his plea in answer to this suit. The dates are in this regard worthy of notice.

On the 27th of April, 1891, the shares were declared by the company to be forfeited, and, on the 5th May, he was notified thereof. On the 27th of September, 1891, he was sued, and on the 21st of December, 1891, the plea of fraud was filed.

It was urged there, as here, that he was too late, but, though the Court found that he had been put on inquiry as far back as the previous March and, as a matter of fact, had formed a shrewd suspicion before the 6th of May, that he had been the victim of a fraud, the lapse of time was of no avail in answer to the claim for relief by reason of the fraud.

Lord Watson thought he and the company were, by the forfeiture of shares in May, remanded to the common law right of rescission. Lord Davey put the matter as follows:—

“The company thereby severed the relation between themselves and the respondent as shareholder, and the respondent became a mere debtor to the company. It is not proved by

any evidence that the respondent had lost his right to repudiate at the date of the notice; and I think that, not having done any act to affirm the contract, he was not then bound to take any step for the mere purpose of getting rid of his liability to pay this call. But I am also of opinion that, if the appellants had intended to rely upon the delay, they ought to have cross-examined the respondent for the purpose of ascertaining when he learned the facts, and to have asked for a direct finding of the jury on the subject.

"Two observations are called for by this case."

Time in itself is not, when dissociated from the peculiar obligations arising from the statute, any more of a bar to repudiating for fraud a contract arising even out of a subscription for shares, than in any other contract.

The time here was, as I count it, no greater than there.

Another observation called for by that decision and remark is that in the defence herein no pleading set up the delay or laches, no contest was made at the trial over any such issue, no reason was asked for appellant's failure to move after he had repudiated the transaction.

No one, for the defence, seems to have thought of such a defence until at the close of the case, as a desperate resort, the leave was asked to plead such defences.

Such evidence as, if attention had been called to it, might have been offered, we are left to speculate on.

But we find that the respondent swore incidentally to answering on other issues, as follows:—

"Q. Did you ever get a balance sheet shewing a statement of the assets and liabilities? A. Never got a balance sheet from the day I took the stock to the present day. They never advised me of the meetings, or one thing or another; everything was done in a hole or corner; never got a statement shewing assets or liabilities or anything else.

"Q. Did you ever get a statement from them shewing their liabilities? A. Never got anything from them; ignored me altogether."

And no reply is made to this evidence.

This is not all, however, for he wrote, as already stated, the defendant, Manchester, who was president of the company, a long letter on the 19th of March, 1904, in which the following passage occurs:—

"There is a lot of other things I would like to tell you, but this will do for the present. I asked Mr. Elkin the other day for the minutes of the meetings held since I bought the

stock, and the last annual reports, but he told me he did not have them, they were at the mill. I went there for them yesterday, but I found Mr. McIntyre was indisposed and not able to be at his post. I told Mr. Elkin I did not want to go into law about the matter if I could help it. And now you will allow me to tell you that the only thing that keeps me back from putting it in the Court is the minutes and the reports. You do not deserve to get another note from me. I sent you three, and you treated me with a great deal of disrespect by not answering either of them. I always thought you were a man disposed to do what was right. This is the last time that I will address you on the subject. If it costs me every cent I am worth I will have the money. I will follow you and Mr. Elkin to the end of your tether, and make you do what is right. If the stock is as valuable as you represented it to be, why not take it up yourself?"

The only answer ever vouchsafed to this letter, containing so explicit a demand for inspection and explanation, is the following:—

"St. John, N.B., April 13, 1904.

"Michael Farrell, Esq.

"Dear Sir,—At a meeting of the directors of the Portland Rolling Mills, Limited, held yesterday, your letter of March 19th was placed before the board, and, on motion, 'the president was instructed to write in reply to Mr. Farrell and notify him that the conditions under which he took his stock have not been changed.'

"Yours truly,

"James Manchester,

"President Portland Rolling Mills, Ltd."

The appellant ran a risk of pressing any further demand for leave to inspect, for to do so by virtue of his standing as a shareholder might have waived his repudiation, and his persisting further might have lent a colour to the argument that his doing so was as a member of the company.

Am I to assume he was not waiting developments of evidence as to subscription of stock by the directors in accordance with the representations?

One of the accusations made as corollary to the existence of stock holdings by directors, is that the directors were to have taken up the balance of the new stock pursuant to an understanding. Suppose they had done so in May or June,

would he have had much to complain of on that branch of his case, even if so tardy fulfilment had been effected?

I do not think it lies in the mouth of a company that acted as this one did in its dealings with the appellant for one moment to complain of delay or laches, much less to seek the benefit of such a defence, if ever open, by such way of presenting it as this.

In addition to the remark of Lord Davey, I would call attention to the remarks at pages 240 and 241, in the judgment of the Privy Council in the Lindsay Petroleum Company case, cited above, in regard to the necessity for pleading not only the laches, but the allegation of facts intended to be relied upon to support it, or shew the injury that has arisen to any one by reason of the imputed delay.

The following sentence is, *mutatis mutandis*, applicable here:—

“In order that the remedy should be lost by laches or delay, it is, if not universally, at all events ordinarily—and certainly when the delay has only been such as in the present case—necessary that there should be sufficient knowledge of the facts constituting the title to relief.”

That the major part of the stock was not held by directors, the appellant may well be held as knowing from the 26th January, 1904.

But the important point, in that same connection, and the allegation of falsehood and fraud charged in relation thereto, as to the exact nature of the purpose or understanding as to future taking up of the balance of the same issue by the directors, as that of which the appellant had bought part, could only be effectually got at by an inspection of the minute books and stock books.

The same may be said as to the real financial condition in preceding years, and the allegations relative thereto.

The appellant, in his impetuosity to repudiate, possibly had not fully considered the necessity for thus arming himself, and I think, in face of respondent's way of treating him, he was well warranted in taking time after the 13th of April, 1904, to discover elsewhere or otherwise the evidence, before launching on a sea of litigation.

The case, though arising out of a sale of stock, presents few of those characteristics that differentiate the usual stock cases cited from others regarding fraud entitling to rescission, so as to render each day's delay strong evidence of that promptitude justice in some cases demands

The company was a kind of close corporation with less than a dozen shareholders when it was decided to offer the new stock, and so little of that was sold that I doubt if any changes in ownership of it took place between April and December, 1904, save to those well informed as to this claim as well as all else bearing on the state of the company.

The burthen rested on those setting up such an equity to plead it and prove it, at least *prima facie*.

The financial condition of the company was probably in fact quite as good when this suit was begun as on the previous 13th of April.

No change for the worse can be said to have operated on the appellant's mind in the way that seems to have happened in some cases.

I cannot find anything to have intervened during the alleged delay in bringing this action that would have entitled any third party to complain of relief being given as of 22nd December, 1904, instead of the 14th of April, preceding.

The circumstances I have adverted to as possibly excusing more prompt action seem, when coupled with default in properly raising the objection to furnish an excuse, quite as potent as in the Aaron's Reefs Case (sup.) or the McNeill Case (L. R. 10 Eq. 503), to repel any objection on the score of laches when there is absolutely no evidence of acquiescence.

In the absence of authority to hold mere delay of itself, after clear express repudiation of a fully paid up stock, a bar, I can see no reason in accord with well understood principles for refusing the relief prayed for here as against the company.

Then, is there a case made against the defendant directors? Is there one upon which we can properly reverse the learned trial Judge's finding of fact?

I do not think so. It seems to me, without being bound to all he may have said, that he was guided in his consideration of the evidence applicable to the case as against these individual defendants, by a correct appreciation of the law by which they should be tried.

The quotation he adopts from Lord Chelmsford's judgment in *Peck v. Gurney* (L. R. 6 H. of L. 377), at page 390, seems supported by the authorities so far as applicable to this case.

The agent employed by these directors by virtue of the resolution entrusting them the disposal of these shares, by his acts bound the company. That the learned Judge found, and I have adopted. It does not follow, as a matter of course

that directors appointed by and on behalf of their company to select an agent, are personally responsible for all that agent does.

No case is made on the evidence that the agent engaged was so untrustworthy or likely to resort to improper means that defendants ought to have been on their guard.

I attach no importance to his marking the prospectus as "private." Whatever he called it, I would call it the act of the company.

Even suppose it were so, and the issue of a prospectus was a thing likely to have happened, as within the scope of his authority, does it necessarily follow either that it assuredly would issue, or that the agent in issuing it would act dishonestly?

The transaction was not so large a one as to render resorting to the circulation of a printed prospectus a certainty or as almost certain to occur.

Nor could any one hold as a matter of law these directors liable for wholly unauthorized verbal representations.

Then, does the evidence of knowledge of these directors of the issue and contents of the prospectus change their liability?

Had it been clear that they or either had been aware before the sale to the appellant, of the use of this prospectus, I should have been disposed to hold him as guilty knowing the use to which his authority was being put, and who, so knowing, refrained from at once withdrawing the prospectus and, if need be, the authority of one so abusing it, and to have held him liable to answer for the consequences.

The dates when each of these directors knew of the prospectus (and I would not be disposed to distinguish as of course the date of knowing of it from the date of reading it), and of the sale of the stock and of the receipt by the treasurer of the company of the purchase money from appellant, are all left quite uncertain.

Some of the most important of these dates could easily have been fixed. It is not fair either to the accused or to the Court in a trial of this kind to leave such things uncertain.

This Court might suspect or speculate, but could not act thereon. In this case, if the Court, impressed by the manner and other things that lead to distrust a witness, had inferred from some parts of the evidence a basis of fact against the defendant Elkin, and been led by such an inference, coupled with what I am about to advert to, had found against him,

I do not know that I should have felt at liberty to disturb the finding.

Manchester's case seems entirely different in regard to these matters that appear in Elkin's case.

As to both, however, there stands on record an apparent neglect of duty such as (if authority be needed) Lord Chancellor Hatherley asserted in Reese River Mining Co. v. Smith, L. R. 4 H. of L. 64, at page 74, was imposed on directors where a repudiation was made of sale of right to shares on the ground of fraud.

It was the plain duty of the directors, including these specially connected with the agent accused, to have investigated such a charge of fraud, and, if the charge made proved well founded, to have agreed to rescission at once.

Elkin's own judgment upon such a case, from what he tells as having passed between him and the agent, should have been quite enough.

He realized the impropriety of the representations made. Why did he not succeed in cancelling such a transaction?

He was, as the evidence shews, clear sighted enough to know the impropriety of resting a sale of stock on such a basis.

Again the appellant has failed to present the evidence of what took place at the board meeting or meetings which led up to Manchester, the president, writing the letter of the 13th of April. If the proper spirit that Elkin evinced when the prospectus was shewn him had prevailed, as it should have done, that letter never would have been written.

But, should I, sitting in appeal, even if I could infer either of these men were at the board meeting that adopted the defiant tone and directed this letter, couple that with other evidence and find them liable? I think not.

I have referred to these things at length instead of contenting myself with simply adopting the conclusion of the learned trial Judge, relative to the director defendants, because they shew that there was a case for investigation which rendered it proper to make these two directors parties defendant.

They have been given their costs below. I might not have thought they were entitled to them in the view of what I think was their duty on learning of this complaint.

They had a chance to shew they were overborne and have not done so. But as we do not, as a rule, interfere with the disposition of costs the Court below has awarded, unless in-

cidentally to a reversal, the judgment of the Court below in regard to these costs must stand.

They succeed here and are entitled to their costs of appeal. But I do not think they should be taxed costs here or in the courts below beyond what were necessarily incurred in their own personal defences. I do not find in the case any answer was made by defendant Elkins—but assume he had nevertheless some costs of defence.

The general costs of the cause throughout, and of the appeals, must be given the appellant as against the defendant company, save as to such parts thereof as were occasioned by the making of the directors defendants to the cause and to the appeals.

MACLENNAN, J.:—I agree in the opinion of Mr. Justice IDINGTON.

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DOMINION OF CANADA.

SUPREME COURT.

JUNE 15TH, 1908.

GREAT NORTHERN RY. CO. OF CANADA v. FUR-
NESS, WITHY & CO.

Coram, GIROUARD, DAVIES, IDINGTON, MACLENNAN and
DUFF, JJ.

*Appeal—Motion to Quash—Security for Costs on Appeal—
Bond — Sufficiency of Security under secs. 75 and 76
Supreme Court Act—Practice.*

The judgment of the Court was delivered by

GIROUARD, J. (oral).—In this case the judgment from which the appeal is asserted was delivered on 9th March, 1908; the notice of application to have security approved on appeal to the Supreme Court of Canada was served on the respondents on 30th April, and this application was presented before Mr. Justice Blanchet on 5th May, within sixty days from the judgment appealed from, as limited by the Supreme Court Act. It does not appear from the papers before the Court whether or not the names of any proposed bondsmen or other security were mentioned at the time of this application; the learned Judge made no order at that time, but took the matter en délibéré. On 3rd June, the respondents were served with a further notice that a bond by a guarantee corporation would be filed as security for the appeal in the office of the Clerk of Appeals, at Quebec, on 9th June, and, on the latter day, the respondents appeared before the same Judge and objected to the security being

approved on the ground that the time limited for such proceeding had elapsed. After hearing counsel, Mr. Justice Blanchet, on the date last mentioned, approved of the security thus offered.

The respondents move to quash the appeal, taking the same objection as was taken before Judge Blanchet, and also contending that the security approved by him is not the security contemplated by the 75th and 76th sections of the Supreme Court Act, the amount being insufficient to stay execution.

The second objection cannot be entertained, the amount being sufficient to bring the case before this Court under section 75; whether an execution can be stayed or not is immaterial.

As to the objection based on expiration of time, we are, with the exception of Mr. Justice Idington, of opinion that the learned Judge before whom the application was made on the 5th May, although he has made no express order to that effect, impliedly extended the time by accepting the security, and we think it is a sufficient compliance with the statute. The Attorney-General of Quebec v. Scott, (34 Can. S. C. R. 282), and the Halifax Election Cases (37 Can. S. C. R. 601), are in point.

The motion is dismissed with costs fixed at \$50.

QUEBEC.

JUNE 19TH, 1908.

COURT OF KING'S BENCH (APPEAL SIDE).

GREAT NORTHERN RAILWAY COMPANY v. FAINER.

Coram, TASCHEREAU, C.J., BLANCHET, TRENHOLME, LAVERGNE and CROSS, JJ.

Railway—Passenger's Luggage—Loss—Liability of Company for Unchecked Goods—Negligence of Conductor—English Law Discussed.

In appeal from the judgment of the Superior Court, Montreal, FORTIN, J., rendered the 28th day of October, 1907. The action was taken to recover the value of a suit

case and its contents and an overcoat, the property of the plaintiff, which he lost while travelling upon the line of the company defendant. The plaintiff, after checking his trunk, took his seat in the first-class car of the train which was to take him to his destination at Rivière-a-Pierre, on the defendant's line of railway. He took with him into the car his dress suit case and its contents, and his overcoat, and put them on the seat in front of him. At a given moment, he wished to smoke, and as there was no smoking compartment in the car in which he was nor in the other first-class car, he went into the second-class car, leaving his effects in the first-class car. When the train reached Grand-Mere the plaintiff continued in conversation with two other travellers whom he knew, and when the train started again he perceived that the car in which he had left his effects had been detached at Grand-Mere. The conductor of the train refused to stop the train, but he telegraphed from the next station to send the effects back to Rivière-a-Pierre. Another telegram sent to another station on the line elicited no answer, and, finally, after waiting several days at Rivière-a-Pierre, plaintiff returned to Montreal, but a thorough search failed to locate the missing effects. The defendant's plea was that it was only responsible for such baggage as had been checked, which had been entrusted to the special care of its employees, and that the several pieces of baggage which travellers are accustomed to take into the cars with them where they take their seats are not entrusted to the appellant's employees nor under their care, and the appellant claims that it cannot be held responsible for the loss or damage of such effects. The Superior Court gave plaintiff judgment for \$206, and costs.

BLANCHET, J.:—The appellant cites article 1672 C. C. in support of its pretensions, and a very great number of decisions of the Courts in England and France, which are to the effect that railway companies are not responsible for the loss of hand bags and trunks and other similar effects when they are not specially entrusted to the care of the employees of a railway or when they are not checked.

I do not think that it is at all necessary to express an opinion upon this point, which it appears to me has no application to the present case.

It is true that there was in the case under consideration no special contract entered into between the parties, but the

appellant by accepting the price of the ticket obliged itself, not only to carry the respondent in safety to his destination, that is to say, give him all the protection possible, but it was also bound and obliged to carry and protect his personal effects, that is, such effects as travellers usually keep with them in so far as it is possible for them to do so. The result is that if such effects are lost during the journey by reason of the fault or negligence of the employees of the railway company, the railway is bound to pay the value of the lost effects to the owner thereof.

There can be no doubt in my mind but that the effects which were lost were in the car at the time it was detached from the train in which the respondent was to be attached to the train bound for Montreal.

It is not proved that the respondent knew that the car would be detached at Grand-Mere, and the notice to this effect which was given by the appellant's employees was insufficient inasmuch as it was given only in the car which was about to be detached and was accordingly not heard by the respondent, who at the time the notice was given was in the second class car.

The brakesman says that he first gave the notice after the train had left Shawinigan Junction, but he is not prepared to swear that the respondent was in the car at the time.

The same notice was given by the brakesman and by the conductor when the train was arriving at Grand-Mere, but they both admit that at that time there was no person at all in the car. It is evident that a notice of this nature was entirely useless and that it should have been repeated in the other cars to which travellers were in the habit of going to smoke, and, in any case, the employees in charge of a train should, under similar circumstances, take care of any effects which may be found in a car which is detached, as this one was, from a train, either by putting them in the next car (because they must be presumed to know that they belong to some traveller), or by putting them in charge of the conductor of the train to which the car is attached.

In the present case neither of these expedients were resorted to. The only excuse the appellant's employees can offer is that they did not see the things.

It is evident that if they had looked with a little more care they would have seen the things in the car, and their neglect in this respect being the determining cause of the

loss of the articles in question, their fault is sufficient to render the appellant liable in damages.

The conductor of the Montreal train, to which the car had been attached, took possession of the car at Grand-Mere, and the appellant thus came to be in possession of the respondent's effects.

The conductor of the train who either refused or neglected to answer the telegrams which were sent after him respecting the effects, was also bound to take care of the effects, and he is also in fault, and the appellant company is therefore liable for the value of the effects.

The appeal is therefore dismissed, with costs.

CROSS, J., dissenting:—The plaintiff-respondent delivered his sample trunk to the defendant appellant and took a check for it.

He kept possession of his suit case and overcoat, but instead of having taken care of them, he left them lying in the rear passenger coach and was sitting in another coach.

The suit case and its contents and the other coat were lost. No reason is shewn why the appellant should have been held responsible for the value of the things lost while in charge of the respondent.

The judgment recites, as being negligence on the appellant's part, that it did not announce in the other coaches that the rear coach would be detached at Grand-Mere; but the fact of not having made such announcement is no reason why the appellant should be held responsible for the loss of personal effects of which the respondent had charge, but of which he neglected to take care.

The appellant contracted to carry the respondent past Grand-Mere to Rivière-a-Pierre, and if, by detaching a coach without notice to him, he had been left at Grand-Mere, there would have been responsibility in damages on appellant's part, but the appellant is no more responsible for the loss of the things, which he left lying in the coach, than it would be if the respondent had left them lying in a station waiting room. I can well understand that in such a case as *Gamble v. Great Western Railway Company*, 24 U. C. Q. B. 407, when passengers are invited to debark for luncheon, the defendant should be held to have taken charge of such movables as would be left in the car while the passengers were temporarily absent, but I consider that no such responsi-

bility can be considered to have been assumed by the carrier who has no means of knowing at what minute an individual passenger may choose to quit a car.

It was contended for the respondent, that his effects were specially pointed out and entrusted to the appellant by notification to the brakesman and the conductor, as the train was leaving Grand-Mere. When this notification was given, however, the train, minus the detached coach, was in motion and had left Grand-Mere and the conductor and brakesman were on it. The case consequently remains the simple case of a passenger who went off leaving his chattels behind him lying in a car in use as a public vehicle. I would reverse the judgment.

QUEBEC.

JUNE 19TH, 1908.

COURT OF KING'S BENCH (APPEAL SIDE).

DOMINION EXPRESS CO. v. RUTENBERG ET AL.

Coram, TASCHEREAU, C.J., BLANCHET, TRENHOLME, LAVERGNE and CROSS, JJ.

Common Carrier—Negligence—Liability—Bill of Lading—Contract—Protective Conditions—Value of Goods not Stated—Force Majeure.

Appeal from the judgment of the Superior Court, Montreal, LORANGER, J., rendered the 29th of October, 1907.

Plaintiffs sued to recover from defendants a trunk and contents, value \$920.75, shipped from Brantford to Winnipeg, and which were never delivered at their destination. A receipt was given for the trunk by defendant's driver. Defendant pleaded it was not responsible for the value of the affects lost, basing itself on the special conditions contained in the receipt in question, and, in any case, that it is not responsible for more than \$50 and costs of an action of that class. Plaintiff answered that to relieve itself from responsibility defendant must prove that the trunk was destroyed by force majeure and without any fault attributed to defendant or its employees. The Superior Court maintained the action in full, with costs.

CROSS, J.:—The material questions which arise are whether or not the appellant was a common carrier of the goods sent, and, if it was such carrier, whether or not it has, by special agreement, contracted itself out of the carrier's responsibility, which, by the judgment, it has been held to have assumed.

It is recited in the judgment that the receipt or bill of lading was hastily prepared at the moment of shipment; that respondents' agent, McClurg, was not given time to read the multitude of printed clauses in it; that it can properly avail for nothing more than a mere voucher for receipt of the goods, and that McClurg was without sufficient authority to bind his employers to the conditions.

It may be said at once that the case as put before us for the appellant, if it is to succeed at all, must depend for the first step in its success upon this receipt or bill of lading being shewn to set forth the contract which was actually entered into and affects the goods in question and its dealings with them.

By the Act, 6 Edw. VII., c. 4, s. 27, certain provisions respecting express tolls and transportation were added to the Railway Act, and these provisions are now to be found in sections 348 and following of the Railway Act in the R. S. C. 1906. By s. 348 of the Act, express tolls are made subject to the approval of the Board of Railway Commissioners, and, by s. 352, that board is empowered by regulation to prescribe what is carriage by express.

Section 358 of the Act provides that no contract restricting the liability of any company charging express tolls with respect to the carrying of any goods by express shall have any force or effect until first approved by order or regulation of the board.

And, in the same section, provision is made that, to allow time for the companies to comply with the Act, contracts lawfully in use immediately before the 13th July, 1906, may continue to be used until such later date as the board might allow.

It appears that, by an order made by the board on the 13th November, 1906, it was provided that such contracts might continue to be used until the 1st May, 1907.

It was proved in this case that the bill of lading of the trunk in question was upon a form of contract in use by the appellant before the 13th July, 1906.

There would, therefore, appear to have been statutory authority for the use of the form of contract in question. Into this form there were inserted, at Brantford, on delivery of the trunk, from McClurg's dictation, McClurg's name, as the shipper, "1 trunk" as the merchandise, nothing after the words "said to contain" and a pencil stroke between the words "valued at" and the word "dollars." Thus, neither the contents nor value were mentioned. McClurg took the receipt, looked at it, and later, on the same day, mailed it to the respondents.

This bill of lading was declared upon by the appellant in this case, the allegation of the declaration being that the shipment was made, the whole as appears by bill of lading filed herewith as exhibit No. 1. The plaintiff could not afterwards repudiate this bill of lading. The strongest reason which McClurg can give for not repudiating the provisions of the bill of lading is that he was in a hurry, and it is not a good reason why his principals should have a better contract than the one he made.

Coming then to the consideration of the actual provisions of the Act, it appears that the first provision relied upon by the appellant, is one to the effect that it is not to be held liable for loss "except as forwarders only." This is supplemented by a subsequent provision to the effect that the appellant in its business relies upon the services of railways and steamboats and is not to be liable for the default of any carrier to whom the goods may be entrusted. The appellant's contention on this point cannot prevail in view of its formal undertaking "to forward" in the contract itself. To "forward" goods is in the nature of a carriage contract, and the undertaking to forward does not imply that the actual carriage is done by any other than the forwarder.

Under the provisions of a carriage contract substantially identical with the one now in question it was held by Boyd, Chancellor, and Justices MacLaren and Mabee in the Ontario Divisional Court (see *James v. Dominion Express Company*, 6 Can. Ry. Cases 309) in substance, that the obligations of an express company were those of a common carrier and not, as was argued for the defendant, merely those of an agent of the forwarder.

In the remarks of the Chancellor is to be found the following statement:—"According to well settled rules of liberal construction in these carriers' cases, the agencies they

employ for the transaction of their business (whether independent lines of railway or not) are all accounted employees, agents or servants of the contracting company. The appellant was, therefore, a carrier."

The next provision of the contract relied upon by the appellant, is to the effect that the appellant is not to be responsible for loss or damage due to the act or fault of railways or carriers to whom the goods might be entrusted, and who, in the terms of the contract, "were to be deemed and taken to be the agent of the person from whom the company received the property above described. It being understood that this company relies upon the various railway and steamboat companies of the country for its means for forwarding property delivered to it to be forwarded."

It does not, however, appear in proof that there was in fact any delivery of the trunk "at any place or point off the established routes or lines run by the appellant." On the contrary, it appears that the appellant's messenger continued in charge of the goods in the cars in which it contends that the trunk was. Further, I consider that the way bill produced by the appellant is additional evidence of possession of the trunk by the defendant. This way bill is headed "Dominion Express Company—Freight Way Bill—Brantford, Ont., to Winnipeg, Man.," but it does not have upon it the name of any railway company or other carrier. This condition, therefore, does not relieve the appellant.

The next provision of the bill of lading relied upon by the appellant is to the effect that the appellant was not to be liable for any "loss or damage by fire, by the dangers of navigation, by the act of God," and, in this connection, that appellant pleaded that it had reason to believe that the trunk and its contents were destroyed by spontaneous combustion while the trunk was in transit and without any wrongful act or fault on appellant's part; that the fire was an accidental one, which the appellant was without power to prevent, the trunk and its contents being at the time in the possession of the Canadian Pacific Railway Company.

In fact, it does appear that about two days after the trunk was shipped a car load of express matter in the appellant's charge was burned at Cartier while being drawn by a locomotive of the Canadian Pacific Railway Company. It is recited in the judgment that it is not proved that the

trunk in question was in the car the contents of which were burned. It seems, however, necessary to come to a different conclusion in view of the facts deposed to by witnesses of the qualified statement in the plaintiffs' declaration and of the positive statement in their attorney's letter of the 11th December, 1906, and to hold that the trunk and its contents were in fact destroyed by fire.

The appellant has made no proof of the fire having been caused by spontaneous combustion. The cause of the fire has not been proved. There was no person on board of the car, the appellant having apparently been satisfied to have the goods go without other care than such as might be afforded by the messenger who was in the next car of the same train. As has been seen, the clause imparting exoneration of appellant in case of loss by fire is included in the very common stipulation for exemption from responsibility, for the act of God, war, riot, etc. It should be construed strictly against the appellant, just as it was held in the *James* case already referred, that the stipulation to the effect that the defendant "shall not be liable for loss, etc., unless it be proved to have occurred from the gross negligence of the company or its servant," did not relieve the carrier from the fault of having transhipped perishable goods (fish), when in transit, in an ordinary freight car. The appellant in the present case pleaded affirmatively on this point, but has not proved its plea.

The other stipulation of the bill of lading, relied upon by the appellant, is to the effect that "nor in any event shall this company be held liable or responsible, nor shall any demand be made upon them beyond the sum of \$50, at which sum said property is hereby valued, unless just and true value thereof is stated herein."

There is a contradiction in the evidence between respondents' agent, McClurg, who testified that nothing was said about the value of the trunk and its contents at the time of the shipment, and that he was not called upon to declare the value, and the appellant's driver, Petch, who testified that he asked what the value was and that McClurg answered that it did not matter and that he was not going to pay express on valuation. In view of this contradiction, it is held in the judgment that the fact is to be taken as not proved.

It seems clear if it be true that the evidence of these two witnesses proves nothing on this point, that the proof

which remains is to be taken as it stands, and, upon the proof which remains, it is manifest that the value was not declared. All that was made known to the appellant was that it was "1 trunk," which was found to have been heavy.

Now, when the sum of \$920.75 is demanded from the appellant for the loss of this "1 trunk," "said to contain . . .," "valued at . . .," it seems necessary to conclude that it was a reasonable thing for the appellant to stipulate that its liability would not exceed \$50. The respondents' position is not bettered by the fact that their agent McClurg was too much hurried to procure a proper bill of lading for this valuable shipment of goods. Still less is it bettered by the fact that the respondents themselves, although aware of this very common stipulation, relied upon the common delusion that "it would not hold."

Shippers may justly claim that the other clauses of this form of contract should be strictly construed against the carrier, for the reason that its servants are usually provided with contract forms in which these conditions are printed and which shippers are practically coerced into accepting, the express agents being given no discretion to strike out or change the conditions, but this stipulation as to non-liability for more than \$50 stands in a different light and can only injure those who neglect to do a fair and reasonable thing, namely, to say what their goods are worth.

I would maintain the appeal and reduce the amount of the condemnation to \$50, with interest, and costs of a Circuit Court suit for that sum, costs in appeal against the respondents.

This is the unanimous judgment of the Court.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 7TH, 1908.

DOOLEY, ADMINISTRATRIX, ETC. v. CITY OF ST.
JOHN.

*Compensation Act, C. S. N. B. 1903 c. 79—Action by Widow
—Contractor's Servant—Liability of City—Municipal
Law.*

This is an action brought (under C. S. 1903, c. 79, "An Act respecting Compensation to Relatives of Persons Killed

by Wrongful Act, Neglect or Default), by the administratrix for damages for the death of the intestate, her husband, who was killed by the caving in of an insufficiently braced trench, which his employer, under contract with the defendant, the City of St. John, was having dug, for the laying of water pipes. The work was being superintended by the city engineer. The cause was tried before Mr. Justice McLEOD, and His Honour, on answers to questions submitted to the jury, ordered a non-suit to be entered on the ground that the deceased being an employee of a contractor of the city and not of the city, the contractor and not the city was responsible for the negligence causing the death.

Pursuant to leave reserved motion was made in Michaelmas Term last, to set aside the nonsuit and enter a verdict for the plaintiff for \$2,700, the amount of damages assessed by the jury.

D. Mullin, K.C., for plaintiff.

C. N. Skinner, K.C., for defendant.

A large number of authorities were cited. For the plaintiff: *Hardaker v. Idle District Council*, (1896) 1 Q. B. 335; *Penny v. Wimbledon Urban Council*, (1899) 2 Q. B. 72; *Holliday v. National Telephone Co.*, (1899) 2 Q. B. 392; *Railroad Co. v. Hanning*, 15 Wall (U.S.) 649; *Indemaur v. Dames*, L. R. 1 C. P. 274; *Grassick v. City of Toronto*, 39 U. C. Q. B. 306; *Van Egmond v. Town of Seaforth*, 6 O. R. at page 614; *Milburn v. Jamaica Fruit Co.*, (1900) 2 Q. B. at p. 551; *Bower v. Peate*, 1 Q. B. D. 321; *Brown v. Accrington Cotton Co.*, 3 H. & C. 511; and *Hughes v. Percival*, 8 App. Cas. 443.

For the defendant:—*Ellis v. Sheffield Gas Co.*, 2 E. & B. 767; *Butler v. Hunter*, 7 H. & N. 826; *Pitts v. Kingsbridge Highway Board*, 25 L. T. N. S. 195; *Rapson v. Cubitt*, 9 M. & W. 710.

The judgment of the Court (BARKER, C.J., HANINGTON, LANDRY, and McLEOD, JJ.), was now delivered by

McLEOD, J.:—This is an action brought by the plaintiff as administratrix of her late husband, John Dooley, who was killed by an accident on the 3rd August, 1905. She claims damages for herself and children for his death which, she alleges, was caused by negligence of the defendants.

The facts of the case may be shortly stated as follows: The defendant desired to open a trench on Rodney street, in that part of the city of Saint John known as Carleton, for the purpose of laying a water main and sewer along Rodney street from the north-east side of Market place to the middle of Water street, a distance of 1160 feet. Rodney street is crossed by Ludlow street, about half way between the Market place and Watson street. The water main was to be laid the whole distance from the Market place to Watson street; the sewer was to be laid from Ludlow street until it met an old sewer running from Watson street down Rodney street; in consequence of this the trench was to be a little wider between Ludlow street and Watson street than it was between Ludlow street and the Market place. The defendant had specifications and plans of the work required to be done prepared, and on these called for tenders for the opening of the trench and refilling it. The tenders were asked for on or about the 23rd of May, 1905. One Henry Crawford on the 31st of May, 1905, tendered in writing for the work; his tender was formerly accepted by the defendant, and he was notified to that effect. I should say that the defendant was to lay the water main and sewer. Crawford, after being notified that his tender was accepted, commenced work about the first week of July, and employed the men that he required for that purpose, and among the men he so employed was John Dooley, the plaintiff's husband. The work was commenced at the Market place and continued on up to and beyond Ludlow street, and some fifty or sixty feet beyond where the connection was made with the old sewer. When he reached the old sewer he requested, as was found by the jury, that he be allowed to make a slight deviation, and instead of carrying his trench under the old sewer, to be allowed to carry it up alongside of it. The deviation so made was very slight. On the 3rd of August whilst John Dooley and other men were digging the trench, some fifty or sixty feet beyond where the connection was to have been made with the old sewer, the sides of the trench suddenly caved in and Dooley was injured, in consequence of which injuries he died on the same day. It is under these circumstances that the plaintiff claims damages in this action. The case was tried before me with a jury at the Saint John circuit in June, 1907. At the close of the case a nonsuit was moved for on the part of the defendant on the ground that Crawford was a sub-

contractor and Dooley was in his employ, and the relation of master and servant did not exist between him and the defendant, and that the negligence, if any, was the negligence of Dooley or his employer, Crawford, and not the negligence of the defendant. I reserved my decision until certain facts had been found by the jury, and after the questions submitted to the jury had been answered I directed a nonsuit to be entered, reserving leave to the plaintiff to move to enter a verdict for herself for the damages found by the jury.

After having heard the case argued and having again considered it, I am of the opinion that the nonsuit was right. No relation of master and servant existed between Dooley and the city. Crawford was a sub-contractor of the city and Dooley was a workman in his employ. The defendant had no control over him, had no right to hire, and no right to discharge him. In the doing of the work by Crawford it was his, Crawford's, duty to see that the men employed by him were properly protected. Dooley received his injuries in doing the work of his employer.

A great many cases may be referred to on a question such as this, that is, as to whether where work is let to a sub-contractor the employer is liable for an injury to an employee, the result of negligence of the sub-contractor. The clear rule is that when work is let to a sub-contractor, the employer is not liable for any injury that may happen to the men of the sub-contractor employed in doing that work. If, however, work is let to a sub-contractor, the doing of which may cause injury to the public, then the employer himself is liable.

Lord Blackburn in *Dalton v. Angus*, 6 App. Cas. 740, at page 829, says as follows: "Ever since *Quarman v. Burnett*, 6 M. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of the contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, can not escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor." In this case no question arises as to the right of the defendant to open this trench, and the complaint of the plaintiff is not that the city did anything wrong in the opening of the trench. The

simple facts are that they let to a contractor the work of opening the trench, the contractor himself employing the men and dismissing them when he chose, and Dooley was his servant employed by him in that work.

In *Rapson v. Cubitt*, 9 M. & W. 710, the defendant, a builder, was employed by the committee of a club to execute certain alterations in the club house, including the fitting of gas fittings. He made a sub-contract with B., a gas fitter, to execute this part of the work. In the course of doing it, through B's negligence the gas exploded and injured the plaintiff; it was held that the defendant was not liable. Lord Abinger, C.B., in giving judgment in that case at page 713, says: "The injury was occasioned by the negligence of Bland, who did not stand in the relation of servant to defendant, but was merely a sub-contractor with him; and to him the plaintiff must look for redress." And Parke, B., at page 713, quotes with approval from *Quarman v. Burnett* as follows. "The liability by virtue of the principle of the relation of master and servant must cease when the relation itself ceases to exist; and no other person than a master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another; consequently, a third person entering into the contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable." In the present case the relation of master and servant did not exist between Crawford and the city. Crawford was simply contractor to do work for the city; the relation of master and servant did exist between Dooley and Crawford, and the liability, if any exists, is the liability of Crawford.

Hardaker v. Idle District Council, (1896) 1 Q. B. D. 335, was cited by the plaintiff, but when examined it does not sustain the contentions on her behalf. Lindley, L.J., in delivering judgment, says at page 340: "There is nothing to prevent them (that is the Idle District Council) from employing a contractor to do their work for them. But the council can not by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or

collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly." He refers to two cases which, he says, illustrate the distinction between these two classes of cases; one is *Reedie v. The London and North Western Ry. Co.*, 4 Ex. 244. In that case the defendant company contracted with certain persons to build a portion of a line of railway and by the contract reserved to themselves the power of dismissing any of the contractor's workmen if incompetent. The workmen in constructing a bridge over a public highway negligently caused the death of a person passing along the highway underneath by allowing a stone to fall on him. It was held that the company was not liable, and Rolfe, B., in speaking of the maxim, "*qui facit per alium facit per se*," says at page 255, that "neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned." The other case is *Hole v. Sittingbourne and Sheerness Ry. Co.*, 6 H. & N. 488. In that case the defendant's duty was to build a bridge which would open and let vessels through. They employed a contractor who built a bridge which would not open, and the defendants were held liable. In giving judgment, Pollock, C.B., at page 495, says: "The short ground on which my judgment proceeds is, that this does not fall within that class of cases where the principal is exempt from responsibility, because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which the maxim '*qui facit per alium facit per se*' applies. Where a person is authorized by Act of Parliament or bound by contract to do particular work, he can not avoid responsibility by contracting with another person to do that work." The present case seems so clear that it is scarcely necessary to refer to authorities to show in what cases the employer would be liable, and in what cases he would not be liable. It is simply a plain case of a contractor employing men to work on his contract; no relation whatever of master or servant existed either between Crawford and the city or between Dooley and the city.

In *Steel v. The South Eastern Railway Co.*, 16 C. B. 550, it was held where work was done for a railway company under a contract the company were not responsible for

injury resulting to a third person from the negligent manner of doing the work, though they employed their own surveyor to superintend it, and to direct what should be done. In the present case Dooley was working in the trench doing the work that the contractor, Crawford, directed him to do. Some reliance was placed on the 8th condition of the specifications, which is as follows: "The contractor to find and place to the satisfaction of the engineer all bracing that may be needed (in the judgment of the engineer) to prevent the sides from sliding, and keep it in position until the said sewer and water main shall be laid and the filling sufficiently advanced to admit of its removal, but a fair price to be paid by the city for the lumber contained in any part of said bracing which the engineer may direct to be left for the protection of said sewer and water main, or for any other reason."

That section does not in any way assist the plaintiff. The defendant was to lay the water main and sewer, and after the trench had been fully opened, it was important that it should be properly braced so as to prevent its sides from falling in before the sewer and water main were laid, or falling in while they were being laid, and provision was, therefore, made that it should be properly braced.

Dooley was injured at a place in which the trench had been completely excavated. The men employed by Crawford (of whom Dooley was one) were doing the work of excavating, and in the performance of that work Dooley received the injuries from which he died. It was Crawford's duty to see that his men were properly protected whilst engaged in this work. The rule must be refused.

GREGORY, J., not present, and WHITE, J., not having heard the argument, took no part.

Rule to set aside the nonsuit and enter a verdict for the plaintiff refused.

JUNE 16TH, 1908.

GOOLD v. GILLIES.

Company Law — Shares—Purchase — Fraud—Promissory Note — Invalidity.

Coram, GIROUARD, DAVIES, IDINGTON, MACLENNAN, and DUFF, JJ.

Appeal from a judgment of the Supreme Court of Nova Scotia, reported 4 E. L. R. 541.

GIROUARD, J.:—I concur in the opinion of Mr. Justice Davies.

DAVIES, J.:—The ground upon which I would allow this appeal and dismiss the respondent's counterclaim is that such claim was compromised, settled and satisfied by the giving of the note sued on.

Judgment was allowed against the respondent for this note and against that judgment no appeal has been taken.

Defendant contested the action on the ground that the note had been obtained from him by false and fraudulent representations. At the trial of the action he was granted leave to put in a counterclaim against the plaintiff claiming damages for the same alleged false and fraudulent representations on which he sought to defend the action on the note.

In effect the respondent now says: "It is true I compromised and settled appellant's claim against me on the note sued on, and I submit without appeal to the judgment on that note which went against me, but such compromise and settlement left open to me a right to sue for damages for the same deceit and fraud I unsuccessfully put forward to escape liability on the note, and did not operate as a compromise and settlement of the entire matter about which we were negotiating.

I am quite unable to accept the respondent's contention. In my opinion his claim for damages for the misrepresentation and deceit on which he sought to avoid liability on the note was included in the settlement and compromise made on the note itself. It seems perfectly clear to me that it was the intention of both parties to put an end to their then existing disputes and to all possible litigation which might arise out of them.

During the negotiations lasting from March 25th, 1904, till the giving of the note sued on December 29th, 1904, and in which period the International Mercantile Agency, for stock in which the original note was given, became insolvent, the following facts appear:

Early in the spring of that year respondent became aware that the stock at the time of its sale to him belonged

to appellant and was not treasury stock as represented to him when he bought.

He also became aware that the note he had given for this stock in favour of the company had been indorsed to the plaintiff Goold. This information was conveyed to him in the clearest and most explicit language by the company's treasurer, Sterling, in his letters of April 2nd and 21st and May 12th.

Respondent was urging by correspondence with the officials of the company that he had been induced to enter into the contract for the purchase of the shares sold to him and to sign the note given for the purchase price by representatives of the agent of the company who sold him the shares and which had not materialized. He was asking for a liberal compromise of the claim on account of these alleged misrepresentations, but affirming that he did not want any litigation. He learns that the stock he had bought was Goold stock and not treasury stock as represented to him when he bought. It was open to him then to repudiate the transaction on the ground of misrepresentation and deceit.

After a great deal of correspondence in which Gillies was put in possession of all the material facts with reference to the stock and with respect to the payment of the notes, for which he was endeavouring to effect a compromise, he succeeded in effecting a settlement, and on the 4th January, 1905, enclosed to the plaintiff's solicitors the notes sued upon, in which letter he says:

"This is worse than throwing it into the sea, as the transaction was an unmitigated swindle."

With knowledge that the representations made to him respecting the stock and the company "had not materialized," with knowledge that the stock sold him "was not treasury stock," but belonged to the plaintiff Goold; with belief on his part that the transaction he was settling was as he expressed it, "an unmitigated swindle," but threats that if they wanted litigation he did not, but if "I must I will," and after months of negotiation he settled the transaction, got extended time for payment and gave his note for the amount now sued on.

In my judgment respondent fully intended at the time he gave this new note to suffer the entire loss of the amount of the claim and had no idea of asserting any claim for damages in answer to or in reduction of appellant's claim.

The question on this branch of the case is whether under all the circumstances of the case the parties intended merely to extend the time for payment of the purchase-money of the stock or to settle by compromise the matters in dispute between them, and which had for months been carried on by correspondence, the one party abandoning his rights by reason of the alleged misrepresentations, and the other conceding to him a substantial concession in the shape of a long extension of credit. A careful perusal of the evidence and correspondence leaves no room for doubt on my mind that the settlement was not merely an extension of the time for payment, but a settlement also of any claims the defendant might have arising out of the alleged misrepresentations.

I would therefore allow the appeal and enter judgment for the appellant on the counterclaim with costs.

IDDINGTON, J.:—In 1901 the appellant was a director on the board of the Sprague Collecting Agency of Chicago and also on the board of directors of the Sprague Collecting Agency of Ontario which was the offspring, so to speak, of the former.

This was the outcome of stock chiefly, if not altogether, acquired by him from one McCauley, and as the appellant explains, "with the distinct understanding that the business was to be converted into the Mercantile Agency." I assume he means International Mercantile Agency Company now in question.

I infer, therefore, he joined forces with McCauley, who later on became the purchaser of the various Sprague companies and the remains of a bankrupt concern of the same nature.

But what he paid for any or all to justify the floating of a company with a capital of \$2,000,000, of which \$1,200,000 should belong to McCauley and his friends such as the appellant, does not appear.

The appellant aided in the promotion by a eulogy of Mr. McCauley and some of the concerns he was planning to have amalgamated in the International Mercantile Agency now in question.

The appellant was informed by a letter of the 18th January, 1902, written from New York by Mr. McCauley, of the accomplishment of the new incorporation and its organization, and that all the members of the boards of the

old Sprague companies had thus become directors of the new company. The appellant recognizes he thereby became a director of the new company.

The evidence shews that the executive committee of this latter company did not meet very regularly or often, but that the board of directors met as often probably as they had necessity to do so.

The appellant was, as a director, in attendance at, I think, all these board meetings.

He had as a result of the foregoing events, become a shareholder of common stock in this new company to the extent of \$40,000. I infer as to a small part of it he was merely trustee for some relatives.

He concluded to sell 290 shares of nominal value of \$29,000 of this stock and in the office in New York of the president McCauley on the 18th December, 1902, arranged with him, who was selling stock of the company through its agents, to sell this for him. He named no price. He fixed no commission.

He never paid any commission though the agent selling got on those sales four per cent from the company.

He says he indorsed a transfer of this stock and handed it to McCauley. But we are not favoured with the production of these documents or any writing up to that time shewing what the transaction really was save the following receipt:

International Mercantile Agency.
346 Broadway, New York.

Office of the President.

Received of E. L. Goold twenty-nine thousand (\$29,000.00) common stock to be sold on his account.

Sgd. T. N. McCauley,

December 18, 1902.

President.

The president, to whom I infer appellant trusted, though not blindly, everything, sold these shares along with others of his own and of the company, by and through the agents of the company for such purposes of sale.

I do not think the appellant is done any injustice in assuming not only that he knew what was being done, but that it was because he knew Mr. McCauley had adopted or was about to adopt the method he did of mixing the sales of company stock with his own for the purpose of disposing of his own shares, of which these had but recently formed

a part, that the appellant entrusted him, as president be it noted, on the face of the transaction, with such proposed sales of 290 shares of common stock.

These shares were accordingly sold by one of the company's agents who admits not that he acted fraudulently, but that he made the false representation found by the Court below to have been made as the result of the method adopted of handling the business.

The appellant received not from the man McCauley, but from the auditor of the company, a letter dated 28th February, 1903, enclosing a cheque for \$11,702, being the balance of proceeds of sale and the note of the respondent, with other notes and a voucher to be signed and returned.

This letter contains the following paragraph:

"You will notice that the total of Mr. Lefurgey's notes makes more than the amount due, but this was in payment of some preferred stock, and, finding it impossible to separate these notes, we send them to you. Also the one of R. C. Wetmore for \$2,000 was made in payment for both preferred and common, and as it was impossible to divide this note we have also sent it."

It hardly lies in the mouth of the appellant, who got that letter, to assume and claim he did not know and could not be held responsible for McCauley's methods. Moreover, it was his duty as a director to have seen that such things as happened should not have had a possibility of happening.

The appellant was clearly liable for deceit and I hold him so, without relying on the foregoing further than to find therefrom that he clearly profited by a false statement made in the course of his (appellant's) business, and which statement had in it the necessary qualities of falsity to make it the subject of an action for deceit and was to the detriment of another—I think he falls within the principles upon which the Privy Council proceeded in the case of *McKay v. The Commercial Bank of New Brunswick*, L. R. 5 P. C. 394.

But the foregoing history and inferences are, though not all necessary to fix liability, useful to have in mind as lights upon the alleged evidence, which the correspondence it is claimed furnishes of a defence, of accord and satisfaction.

It is urged that by a renewal by this respondent of his promissory note given for this stock and the extension of time he got, such a defence of accord and satisfaction is

made out and is a complete answer to the claim set up by way of counterclaim for the deceit referred to above.

There is no plea to the counterclaim making any such defence to it.

There never was a bargain to forego any action of deceit.

There never was put before the appellant's mind, much less set up by him, a cause of action for deceit from which he sought a release, when, and as part of the dealing whereby he sought a confirmation of the sale. He never condescends to notice such charges as were made.

There never was present to the respondent's mind when writing the letters he did such a case as the foregoing presents. I fail to see how we can find what those concerned never supposed they were agreeing to, was agreed to.

The respondent certainly used very emphatic language as to the company and the value of what he was getting by having given his note and giving the renewal secured as it was. But it was all quite consistent with his entire ignorance of the relations between the appellant and McCauley and the appellant and the company and this appellant's intimate knowledge of the dealings of both.

It is to be observed that what was presented to the respondent's mind was that he had merely got the shares of another stockholder who for aught that appears might have been victimized as he had been, or might in truth have bought, but had not yet paid for, actual treasury stock, and thus was getting rid of it and so substituting the respondent and after all giving respondent treasury stock.

For aught he knew appellant was an endorsee for value without notice of any fraud. He had given his note to the company and it was endorsed by the company to the appellant. Such was the face of the transaction.

There is in law on the facts no release of the action of deceit that had enured to the respondent and for which he has judgment on his counterclaim, though what happened may have been as held an answer to the claim for rescission.

The adroit suppression of the appellant's position as a director and representing him merely as a stockholder when explaining how he came to get the respondent's note would, I incline to think, have made it difficult to have upheld an express release of the action of deceit if such had been got under all the facts and circumstances I have referred to.

I think, if the able man of business I take him for on the evidence, that the appellant (whatever his position may have been at the outset or earlier stages) had by this time of renewal got so much light as to the probable fate of the company and the causes of its fate as to have rendered his duty towards the respondent as a director and otherwise to think twice before pressing such a claim and involving others as sureties without disclosing the facts.

I think the appeal should be dismissed with costs.

MACLENNAN, J., concurred in the above judgment.

DUFF, J.:—In *Cornfoot v. Fowke* (6 M. & W. 358), it was said by Rolfe, B., at page 370, that:

“Or if the defendant purposely employed an agent ignorant of the truth in order that such agent might innocently make a false statement believing it to be true, and might so deceive the party with whom he was dealing, he would be guilty of a fraud.”

By Alderson, B., at page 372:—

“It is said that this will open a door to fraud by enabling parties in the situation of this principal, themselves conscious of objection to their premises, to appoint agents who, unconsciously, may make misrepresentations to the injury of third persons. This does not follow. If the fact could be shewn it would be fraud on the part of the principal with such a motive to appoint such an agent.”

And by Parke, B., at page 373:—

“It must also be admitted that if the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked from him, and at the same time believing or suspecting that it would, by reason of such ignorance, be answered in the negative, the plaintiff would unquestionably be guilty of a fraud . . . ; for then the representation of the agent, which he intended to be made, would be the same as his own; and his own representation, coupled with a knowledge of its falsehood, would doubtless be a fraud.”

These observations were quoted with approval in *Ludgater v. Love*, (44 L. T. N. S. at page 696), by Brett, L.J., and in substance re-stated by Lord Selborne, in the same case at page 697; and there is nothing in *Derry v. Peek* (14 App. Cas. 337), which conflicts with them. The principle thus sanctioned by such eminent authority seems

to me, after a careful examination of the whole evidence, to fit precisely the facts disclosed by it as touching the responsibility of McCauley for the representations of his agents.

That Gillies suffered damage by reason of his subscription seems to be quite clear. The company went into liquidation in August, 1904, and that circumstance, taken with the other facts disclosed in the evidence, are quite sufficient, in my opinion, to lead to the conclusion that the shares which Gillies purchased were not at the time he purchased them worth what he paid for them. The fraud for which Goold is responsible, having been a material inducement leading Gillies to enter into the purchase of the shares, the measure of damages is the difference between the purchase price and the value of the shares (that is to say, a fair price for them), at the time of the purchase. *Davidson v. Tulloch*, (3 Macq. 783); *Arkwright v. Newbold*, (17 Ch. D. 312).

The only serious difficulty arises upon the contention of the appellants that Gillies has released his right of action. The contention is based upon the correspondence which passed between him and the appellants' solicitors before the execution of the note sued upon—which was given in renewal of the note of February, 1903. Now it is plain that Goold insisting on holding Gillies to his bargain, Gillies might after the discovery of the fraud affirm the bargain by renewing his note or paying it and still retain his right to sue for deceit. *Houldsworth v. City of Glasgow Bank*, (5 App. Cas. at page 323); *Kerr on Fraud*, 352; *Lindley on Companies*, 683; *Arnison v. Smith*, (41 Ch. D. 369, 372, 378). In his action for deceit the respondent can recover, as I have mentioned, only the difference between the value of the shares at the time of his purchase and the purchase price; and that right of action is not displaced merely because he has precluded himself from resisting an action for the latter. The waiver, in a word, of his right to set up the fraud in answer to this last mentioned action, does not by any rule or implication of law import a satisfaction of his substantive right of action for damages.

The appellant can, consequently, succeed in this contention only by shewing that this cause of action has been released. In this, I think, he fails. His contention is that Gillies, in December, 1904, after the note of February, 1903, was overdue applied for an extension of time which the

appellant granted by accepting in renewal of that note a fresh note payable some months later; and the consideration for this extension of time as shewn by a correspondence between Gillies and the appellants' solicitors, was the release of Gillies from all liability in respect of Gillies's purchase, including the claim now in question.

I will state briefly why I am unable to accept the contention that the correspondence referred to, discloses any agreement having the effect mentioned. First:—There are the concurrent findings of the two Courts below that the appellant was not, when he executed the note of December, 1904, aware of the fraud practised upon him.

These findings, it is true, seem, at first sight, inconsistent with some earlier letters (which are in evidence), between Gillies and the secretary of the company shewing that Gillies was, months before the execution of the note of December, 1904, informed that the shares allotted to him had been Goold's. But the learned trial Judge and the Court of Appeal accepted Gillies's testimony that this statement made no impression upon him, partly because of his pre-occupation with other affairs and partly because he thought the writer of the letter was endeavouring to mislead him; and that, in spite of it, he remained under the belief that the shares were what they had been represented to be at the time of the purchase.

Moreover, it is quite clear that he was not aware at the time of the execution of the note of December, 1904, of the real character of McCauley's fraud. He did not know until months afterwards that McCauley and his co-directors (under the cover of the company's name, and under the pretence of allotting to subscribers the company's unissued capital, and under the further pretence that in receiving the subscribers' payments they were acting on behalf of the company), had been getting rid of their own shares and appropriating the proceeds of the subscriptions in payment of them,—and that he, Gillies, had been one of the victims of this imposition.

In these circumstances, it would not be sufficient to support this contention I am considering, that, in the letters relied upon, there should be found language sufficiently comprehensive in its broadest sense to extend to a right of action for deceit as against Goold. Once it appears that Gillies was not acquainted with the facts of the fraud in respect of which the present claim is made, the appellant

is bound to make out that an intention is manifested by the correspondence to include within the composition any such rights of action, whether then known or not known to exist; and the question is, whether, fairly read in the light of all the circumstances, the correspondence shews that such was the intention of the parties. I confess, with the highest respect for the views of others, that, to my thinking, that question must very plainly be answered in the negative; and, consequently, that it would be repugnant to fundamental principles to give effect to the language of the letters in the sense for which the appellant contends.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

QUEBEC.

JUNE 19TH, 1908.

COURT OF KING'S BENCH (APPEAL SIDE).

LAURIN v. GINN.

Coram, TASCHEREAU, C.J., BOSSE, TRENHOLME, CROSS and BRUNEAU, AD HOC., JJ.

Sale of Goods—Collection of Stamps—Contract—Breach—Action—Plea of Goods Stolen without Vendee's Fault.

Appeal from the judgment of the Superior Court, Ottawa, rendered the 6th November, 1907. Plaintiff, a stamp merchant, mailed from London, England, to defendant, at his address at Gatineau Point, Que., some 31 sheets of stamps, used and unused, for the price of \$1,217.61, in several instalments, the last of which were received by defendant on or about the 5th September, 1906. The stamps, plaintiff alleges, were sent on approval, and thereby became the property of defendant, and defendant having failed to return the same, is liable for the price; that the rights of the plaintiff are governed by the law of England, and that by the law of England, as well as by the law of the province of Quebec, defendant became the owner of the stamps on receipt of same, and became and is bound to pay

said price, by reason of his failure to return said stamps forthwith upon inspection. Defendant pleaded a categorical denial, and further that the stamps reached his domicile in his absence; and upon his return, before the delay had elapsed for him to accept and keep them, defendant's premises, and his safe in which the stamps were lodged for safe-keeping, were entered and destroyed by burglars without any fault or negligence on his part, and the stamps stolen and taken away, for which defendant is not responsible, and the risk and loss is upon the plaintiff, and defendant is not liable for the amount claimed. The judgment gave plaintiff \$810.64, holding that the contract was made and completed in England and was to be interpreted according to its laws and customs; and, according to the uncontradicted evidence of two barristers and three experts from London, England, defendant was responsible towards plaintiff.

TASCHEREAU, C.J.:—There never was a contract of sale between the parties relative to the stamps sent by the respondent from London, England, to the appellant at Gatin-eau Point, Quebec; that the latter had simply made known to respondent his intention of buying a certain quantity of stamps, if, after examination, he was of the opinion to conclude the sale; that thereupon respondent sent appellant the stamps in question and appellant, after receiving them, took the care of a *bon pere de famille* of the stamps and deposited them in a place of safe keeping; that some days afterwards the appellant's house was broken into by burglars, who broke open the receptacle containing the stamps and took them, as well as other things belonging to appellant; that despite the efforts of the officers of the law, the burglars were never caught and the stamps never recovered.

The appellant had a reasonable time within which to examine the said stamps and make known to respondent his intentions respecting them; it was during this reasonable time that the stamps were stolen; the appellant is not in fault and, under the circumstances, the loss of the stamps must be supported by respondent, who always remained owner of the stamps, and not the appellant, who took all the required care and who was not in fault.

The appeal is allowed, with costs, and the judgment of the Superior Court is reversed and plaintiff's action is dismissed with costs.

TRENHOLME and CROSS, JJ., dissented from the judgment of the majority of the Court.

NEW BRUNSWICK.

FULL COURT.

APRIL 30TH, 1908.

REX v. EBBETT, EX PARTE SMITH.

Debtor and Creditor—Disclosure Order—C. S. N. B. 1903 c. 130—Discharge of Debtor from Arrest—Certiorari.

An order made in disclosure by A. W. Ebbett, Clerk of the Peace, Queen's County, under the provisions of chapter 130, Con. Stat. 1903, discharging from arrest and imprisonment one Connor, the defendant in a suit between Smith plaintiff and Connor defendant, was removed into this Court by certiorari, and motion to make absolute the rule nisi to quash this order was argued on 16th instant.

J. R. Dunn shewed cause against the rule nisi to quash and contended that the facts shewed that the officer exercised a reasonable discretion, and the Court would not interfere, and cited *Rex v. Carleton, ex parte Akerley*, 37 N. B. R. at page 17, and *Murray v. Moffat*, 19 N. B. R. 481.

W. A. Ewing, in support of the rule nisi.

The judgment of the Court (BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY and WHITE, JJ.), was now delivered by

LANDRY, J.:—This is a matter of disclosure and discharge from arrest and imprisonment under Consolidated Statutes, 1903, c. 130.

The plaintiff in the suit of *James C. Smith v. N. Dexter Connor* caused a bailable writ to be issued against the defendant for \$1,200, dated 13th April, 1907. On the 16th April, 1907, the defendant was arrested by virtue of this writ and gave bail. On the 22nd of April the plaintiff was served with a notice of disclosure returnable before the clerk of the peace for the county of Queens on the 29th day of April. On this latter day the defendant was exam-

ined before the clerk of the peace, both sides being represented by counsel, and on the 6th day of May the clerk of the peace made an order discharging the defendant from arrest and imprisonment and directing the bail bond to be given up and cancelled. A rule absolute to quash this order of discharge and the order for cancelling the bail bond is now being asked for from this Court. The grounds taken are:—

1st. That the defendant transferred before his arrest property with intent to defraud the plaintiff.

2nd. That after his arrest he gave preference to another creditor.

At the disclosure the defendant was examined as was also the plaintiff. The acts of the defendant relied on for shewing a fraudulent transfer and undue preference were:

(a) That on the day before his arrest he gave a mortgage to a creditor of his real estate, and sold to the same creditor on the same day his personal property for \$1,400.

(b) That about the time of his arrest he owned real estate worth about \$1900, that he gave a deed of part of it worth about \$1,500 to his wife, and that he then gave his creditor a mortgage on both the pieces of property, his wife joining in the mortgage. The evidence discloses that the defendant was indebted to a Mr. Wood for about \$4,000, that Mr. Wood desired security; that to secure and partly pay him the defendant sold to him his personal property for \$1,400, and mortgaged his real estate as above stated. These transactions were done very shortly before his arrest.

In section 7 of chapter 130 are found these words:

“ . . . if satisfied that the disclosure is a full one, and that the defendant has not transferred any property intending to defraud the plaintiff, or since his arrest given any preference to any other creditor, may by order discharge the debtor from arrest and imprisonment . . . ”

These words include the matter to which objection is raised in this application. Under the Act the defendant is entitled to his discharge (all preliminary steps having been duly taken) when the clerk of the peace or other official authorized to hear the evidence, and adjudicate upon it, is satisfied that the disclosure is a full one and the defendant has not transferred any property intending to defraud the plaintiff, or since his arrest given any preference. The statute makes in this case the clerk of the peace the judge of the evidence, of the credibility of the witnesses, and what their

testimony proves. He having passed on the evidence, the fulness of which is not objected to, and his finding appearing to be supported by the testimony given, I do not think this Court should disturb it. He was satisfied that no transfer of property had been made by the defendant with intent to defraud the plaintiff. That finding appears to be borne out by the account given in evidence of the transaction had a very short time before his arrest. If he was indebted to Wood, and the clerk of the peace must have so found, the fact of his owing the plaintiff at the same time would not prevent him in law paying Wood or securing him his pay, if there was no intent in the transaction to defraud the plaintiff. Such a transaction as is detailed in the evidence of the passing over personal property in part payment of a just debt and of mortgaging real estate to secure the balance of such debt, may and can be done with honesty of purpose and in accordance with the legitimate carrying on of ordinary business. The fact of the real estate having first been deeded to his wife does not in itself necessarily involve fraud. It is in proof that the wife was equitably interested in the real estate deeded to her to the extent of \$500. By the transaction Wood is secured in what the clerk of the peace found to be an honest debt; the wife is placed in a position to be able to redeem the property by being given the equity of redemption and no fraud is apparent on the face of the proceedings. In his finding that after his arrest the defendant gave no preference to another creditor, the clerk of the peace is supported by the evidence, and I can see no evidence offered on which to base a finding the other way. The testimony to which one's mind can be drawn to question the finding of the clerk of the peace on this point is that given of Wood having taken after the arrest of the defendant corporal possession of the personal property sold to him by the defendant before the arrest. The defendant swore that when he sold the personal property the day before his arrest, he told Wood that he gave him possession and that he took a receipt for the price agreed upon as part payment of the debt due him, Wood, and that he then had no knowledge that he was going to be arrested, nor did he then know that he was indebted to the plaintiff. The plaintiff swore that he had caused the arrest because he had found out that the defendant was trying to sell his horses, confirming the view that negotiations for a sale of the personal property were being had, even if not completed,

before an arrest was decided upon. To strengthen the evidence of the bona fides of the sale, no proof was offered to throw doubt on the reasonableness of the price received for the personal property. For these reasons the rule nisi will be discharged.

Rule nisi to quash discharged.

DOMINION OF CANADA.

SUPREME COURT.

JUNE 30TH, 1908.

McGARVEY v. McNALLY, ES QUALITE.

Will—Legislative Amendment — Private Bill—Executors.

Appeal from judgment of Court of Review for District of Montreal.

Surveyer, for appellant.

Atwater, K.C., and Duclos, K.C., for respondent.

GIROUARD, J.:—We are again invited to give effect to a statute of the Legislature of Quebec undertaking to substitute a will of its own for the will of the testator, Owen McGarvey, in his lifetime, furniture manufacturer, of Montreal, and this in spite of the strongest enactment made by the Imperial Parliament as early as 1774, in 14 Geo. III. c. 83, generally known as "The Quebec Act," which is the first Imperial Charter of Canada outside the Capitulations and the Treaty of Paris.

Section 10 of that Act provides that it shall be lawful for any person freely to "devise or bequeath . . . by last will and testament" any property he may have or leave at his death. This enactment has been reproduced in the Civil Code, forms the general law of the province, and has always been looked upon as one of the dearest rights of every British subject. Mr. Owen McGarvey has made a will under these laws; but, after his death, the provincial legislature was requested by his heirs to make another will or at least materially change the same. Mr. Justice Mathieu, who dissented in the Court of Review, observes that "it seems hard to believe that our legislators in Quebec have any mandate from the electors to change wills."

But, as long as these extraordinary private bills are not disallowed by the Government of Canada, which is the guardian of the people of the Dominion, we must accept them as binding laws. The Imperial Parliament always could and still can change these laws, but, with regard to property and civil rights, a provincial legislature is as omnipotent as the Imperial Parliament, subject to the veto power.

I do not intend to review all the facts of the case. They are fully set forth in Mr. Justice Mathieu's dissenting judgment, in which I concur, and I merely refer to it to ascertain what they are.

We are unanimously of opinion that the judgments of the two Courts are wrong and must be reversed. It is contended by the respondent that the time for winding up the estate has been extended indefinitely, just as the executors deem expedient. This Court does not entertain that view; and, although I have some doubt upon the point, it is not strong enough to make me dissent from the majority, and, as usual in cases like this, as I observed in the case of *Prévost v. Lamarche*, 38 Can. S. C. R. 1, that doubt should be given in favour of the will of the testator.

With regard to the second point involved in the appeal, viz., that the sum of \$50,000 be invested for the benefit of the appellant, no doubt is possible. The clause of the will is clear and is not in any way changed or affected by the Quebec statute. Here it is, word for word.

"I give and devise, after the death of my said wife, to my said daughter, Margaret McGarvey, during her lifetime, the income or revenue of the capital sum of fifty thousand dollars, current money of Canada, which capital shall be invested with first class security by my executors for the best advantage of my said daughter, and, at the death of my said daughter, the said capital I give and bequeath to her lawful children and descendants, to be divided amongst them, share and share alike, by families, 'par souche' according to law, and to be their own and absolute property for ever."

We are, therefore, of opinion that the appellant is entitled to the main conclusions of her action. If the estate of the late Mr. McGarvey be not sufficient to bear the investment of the whole amount, then the deficit shall be met by the estate of his late wife.

The appeal is allowed with costs, and, adopting the formal judgment suggested by Mr. Justice Mathieu, the demand of the appellant is maintained with costs in all Courts and the defendants *ês qualité*, as executors of the will of the late Owen McGarvey, as amended by the Quebec statute. 3 Edw. VII., c. 136, are condemned to pay to the said appellant (plaintiff in the Court below), the sum of \$1,275, with interest on the same from the 10th day of September, 1904, the date of the service of this action, and they are further ordered and condemned *ês qualité* to invest, within six months from this date, the sum of \$50,000, or so much as the plaintiff is entitled to have from the estate of the said late Owen McGarvey, with first class security for the benefit of said plaintiff, reserving to adjudicate hereafter on any other portion of the plaintiff's demand and reserving also to the said plaintiff all other recourses she may have in the premises.

The motion to quash is dismissed with costs fixed at fifty dollars, as the amount involved in this appeal is the investment of a sum of \$50,000, which is quite sufficient to give us jurisdiction.

DAVIES, J.:—I am to allow this appeal.

I do not think the statute enlarges the express limitations of the will as to the time within which the estate should be wound up.

I think there should be judgment accordingly, and a declaration to that effect, and also that the executors should proceed without delay to administer the estate and render full accounts to the appellant (plaintiff), of their administration in the proper Court.

IDINGTON, J.:—I think the conclusions arrived at by Mr. Justice Mathieu, who dissented in the Court below, are correct. I adopt, speaking generally, his reasoning, save as indicated hereunder, and that questioning the right of the legislature as to amending wills. In this latter regard, I neither approve nor disapprove of what may have been done. The clear purpose of the testator was that, at least within the year next after the death of his wife, the estate would be wound up.

The legislation got, facilitated this being done.

The same legislation as clearly as possible indicates that the appellant's rights should not be interfered with.

It seems idle to talk of the testator's real estate, as he left it, being such an investment as he contemplated when he directed as follows:—

"I give and bequeath, after the death of my said wife, to my said daughter, Margaret McGarvey, during her lifetime, the income or revenue of the capital sum of fifty thousand dollars current money of Canada, which capital shall be invested with first class security by my executors for the best advantage of my said daughter; and, at the death of my said daughter, the said capital I give and bequeath to her lawful children and descendants, to be divided amongst them, share and share alike, by families, 'par souche' according to law, and to be then their own and absolute property forever."

The will also contains the following order:—

"I wish and direct that my estate be settled and wound up within one year from the day of the death of my said wife."

I venture to say that the testator's language is so clear in respect to the duty to be discharged by the executors as regards appellant's rights in the estate that, if they delayed obeying the directions given thereby so that the appellant has suffered any loss, they must make it good.

I should say that five per cent. could easily have been got in good safe investments, and for that reason, assent to the conclusion of Mr. Justice Mathieu that no investment having been made the legal rate may properly be adopted as the measure of appellant's claim in the absence of such investment.

I would not desire to be bound to that holding as a rule of law under all circumstances.

Primâ facie it may well be accepted as a guide.

The appeal should be allowed with costs here and in the Courts below to the appellant throughout.

Since writing the foregoing, I have concurred in the form of judgment drawn up by Mr. Justice Girouard, the acting chief justice.

The formal order, concurred in by all the Judges, was as follows:—

The appeal is allowed with costs; the demand of the appellant is maintained with costs in all Courts and the defendants *ês qualité*, as executors of the will of the late Owen McGarvey, as amended by the Quebec statute, 3 Edw. VII. c. 136, are condemned to pay to the said appellant (the

plaintiff in the Court below), the sum of \$1,275 with interest on the same from the 10th of September, 1904, the date of the service of this action, and they are further ordered and condemned *ês qualité* to invest, within six months from this date, the sum of \$50,000, or so much as the plaintiff is entitled to have from the estate of the said late Owen McGarvey, with first class security, for the benefit of said plaintiff, reserving to adjudicate hereafter on any other portion of the plaintiff's demand and reserving also to the said plaintiff all other recourses she may have in the premises.

The motion to quash is dismissed with costs fixed at fifty dollars.

DOMINION OF CANADA.

SUPREME COURT.

MAY 14TH, 1908.

AINSLIE MINING AND RAILWAY CO. v. McDOUGALL.

Coram, GIROUARD, DAVIES, IDINGTON, MACLAREN and DUFF, JJ.

Appeal—Practice—New Trial—Right to Appeal from Judgment after New Trial.

GIROUARD, J.:—We are all of opinion that this appeal must be quashed on the simple ground that where a party appeals to the full court from a judgment at the trial, and asks for a new trial, either as the sole or as an alternative relief, and such new trial is granted in such case, having obtained the relief asked for, there can be no appeal to this Court from such a judgment. In this respect we follow the judgments of this Court in *Mutual Reserve v. Dillon*, 34 Can. S. C. R. 141, and *The Corporation of Delta v. Wilson*, reported in *Cameron's Practice*, at p. 99.

DOMINION OF CANADA.

SUPREME COURT.

MAY 18TH, 1908.

REX v. EAD.

Coram, FITZPATRICK, C.J., DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

Criminal Law — Forgery — Promissory Note — Conviction — Stated Case by Trial Judge — Code, s. 1014, s.-s. 3 — “Trial” — Arrest of Judgment — Appeal — Form of Indictment — Practice.

Appeal from a judgment of the Supreme Court of Nova Scotia.

IDINGTON, J.:—The appellant was indicted for forgery of an alleged promissory note and tried upon such indictment at the Criminal Term of the Supreme Court of Nova Scotia, held by Mr. Justice Longley with a jury. The evidence to support the charge was that he signed the name “Thomas Healey” to a piece of paper of which the following is a copy:

“\$14. November 18th, 1907.
..... after date promise to pay to the
order of dollars
at value received.
No. Due(Sgd.) Thomas Healey.”

The evidence further shewed clearly that he was not the person he represented himself to be, and whose name he signed, and that his signing was fraudulent and to the prejudice of the private prosecutor who had sold him a coat for the price of fourteen dollars, in payment of which at the sale thereof he signed and gave the vendor the paper in question.

There was no objection taken to the indictment, the reception of the evidence, or the direction of the learned trial Judge, and the accused was found guilty. Thereupon and before sentence was passed, objection was taken, for the first time, that the accused could not on such evidence be convicted of the crime alleged.

The learned trial Judge declined to reserve a case as requested upon this objection and sentenced the accused to three years in the penitentiary.

The Supreme Court of Nova Scotia being the proper appellate Court in the premises, was moved on behalf of the prisoner to direct the learned Judge to state a case and so directed accordingly.

The learned Judge stated with a brief report of the case the following points:—

“1. Does the indictment disclose any criminal offence?

“2. In view of the fact that the instrument signed was a blank form of a promissory note, not filled in, was the prisoner rightly convicted of forgery of a promissory note?”

The Supreme Court of Nova Scotia, upon hearing this appeal, dismissed it, but Mr. Justice Meagher, one of the Court of Appeal that so heard the appeal, dissented in regard to the second question and held that there should be a new trial.

The prisoner has appealed from that decision.

The objection is taken here, as it is in the Court below, that the prisoner had not any such right of appeal, as he was given leave to present, to the said Court.

The question thus raised turns upon the interpretation of the Criminal Code, s. 1014, s.-s. 3, which can better be considered with and in relation to s.-s. 2 of the same section. These sub-sections are as follows:

“1014

“2. The Court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge, for the opinion of the Court of Appeal in manner hereinafter provided.

“3. Either the prosecutor or the accused may, during the trial, either orally or in writing, apply to the Court to reserve any such question as aforesaid, and the Court, if it refuses so to reserve it, shall nevertheless take a note of such objection.”

It is urged on the one hand that the words “during the trial” in this s.-s. 3 must include everything up to and including the sentencing of the prisoner.

On the other hand it is said that the plain ordinary meaning of the word “trial” must be adopted, and that according to such reading the trial ends with the verdict of the jury.

I think this latter contention the correct one. A man might never be sentenced, yet he stands convicted when

found guilty or acquitted when found not guilty, and either could successfully plead respectively *autrefois convict* or *autrefois acquit*, as the necessities of any later case might render necessary. Sentence so uniformly followed a conviction in olden times as to give the passing of sentence a semblance of part of the trial. It was also the point at which long ago most of the serious questions of law raised upon a trial came up for final disposition if not conclusion.

Ever since our Canadian Statute (in 1869), 32 & 33 Vic. c. 29, was passed, almost all this has changed.

It was by s. 32 of that procedure Act, enacted that objections to any indictment for any defect apparent on the face thereof must be taken by demurrer or motion to quash—before defendant pleaded—and not afterwards.

Power of amendment was given the Court by the same section in order to meet if possible the objection that might be so raised.

Thus far the English legislation, 14-15 Vict. c. 100, was followed. Indeed our whole criminal legislation of 1869 followed largely this beneficent English reformation of the criminal law. In this instance, however, the Parliament of Canada went a great step in advance of the other. Instead of limiting the peremptory requirement for demurrer or motion to quash to any formal defect, our legislation dropped the word “formal” and made the requirement apply to and prohibited the motion for arrest of judgment in any such case where demurrer might have been upheld or power to amend existed. That now stands virtually the same in our Criminal Code, s. 898, with s.-s. 2 as follows: “898. . . .

“2. No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by the demurrer, or amended under the authority of this Act.”

This radical difference between the English and Canadian legislation acted upon in *Regina v. Mason*, 22 U. C. C. P. at 250, ought always to be kept in view in reading English authorities in relation to proceedings at trial including indictment.

The important ground left for such a motion seems to be as stated in the Code by s. 1007, s.-s. 1, to be founded on the ground shewn therein, which is as follows:

"1007. The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not, after amendment, if any, state any indictable offence."

This is not as clear as one would wish. Is it only in the case of an amended indictment that the motion lies?

The very comprehensive language of s. 989 shews how very limited a field is left for motions in arrest of judgment.

It is quite possible that after a prisoner had pleaded, instead of demurring, that the indictment might erroneously be amended by a trial Judge in such a way as to render it bad in law.

If he should, over-confident of his own judgment, make a mistake in refusing to allow a demurrer to an amended indictment, the only recourse the prisoner would have as of right, save objecting to the amendment and noting of it, would be this motion to arrest judgment.

But is there any reason found in that for the extending of the right of appeal? The accused when the motion to amend has been made has every chance to object, and then thus come within the limited meaning of the words "during the trial" and be able to insist on properly laying a foundation for appeal.

The chances of legal wrong ever being done by a trial Judge to the accused after the verdict are almost infinitesimal, and so easy of remedy by appeal to the clemency of the Crown that one cannot see injury likely to result from limiting his rights of appeal to that which transpired before the verdict.

On the other hand, if the trial referred to in this s.-s. 3 of s. 1014 of the Code were extended to include proceedings after verdict, then the accused would have left open to him in every case the right to keep silence and only interpose his objections after the verdict when nothing could be amended.

The door would be thus thrown wide open to almost interminable appeals, nearly all of which might ultimately prove quite unfounded, yet persisted in would serve the purpose of the accused, who was guilty but desired proceedings prolonged until he was quite forgotten, as a satirist tells us happens in the administration of the criminal law where justice is not swift of foot.

There is a marked difference between the provision made in s.-s. 2 and that in s.-s. 3 of s. 1014 of the Code.

The first is intended to cover almost every case that a trial Judge can reasonably have brought under his notice for reserving a case.

It entrusts to him the protection of the accused in any case in which the law apparently leading to his conviction may be doubtful.

The trial Judge generally, and if I may be permitted to say so, properly gives the prisoner the full benefit of any such doubt as he may have by reserving a case.

It is better that a number of cases barely arguable be remitted by this means to an appellate tribunal, than that a trial Judge should feel oppressed by the risk of being responsible for an illegal conviction.

On the other hand, the accused is given as of right every opportunity of contesting the ruling of the trial Judge on anything that arises in the progress of the trial.

If this prisoner, for example, had availed himself of this right he could easily have laid the foundation at the proper time for carrying his case to appeal.

Of course his doing so might not have led to acquittal but might have led to amendments or other proceedings or actions of the Court that might have ultimately brought about a conviction of what he was properly chargeable with.

That is, however, what the law is designed to effect.

As to the objection taken to the form of indictment, I doubt if that is properly before us.

The Court below was unanimous in upholding it. It is only in a case of a dissenting opinion that a prisoner can come to this Court as of right.

I think the appeal should be dismissed simply on the ground that an appeal founded on the way it was did not lie either to the Court below or to this Court.

The case was argued fully on all points both as to the right of appeal and the merits of the objection to a conviction for forgery, as of a promissory note where such a note never did exist, but a something so indescribable in law as the paper of which above is a copy.

I have considered the possibility of holding that, as it was a case in which the learned trial Judge might have reserved a case, his doing so might, though in obedience to an order of the Court, be treated as if originating on his own motion.

Doing so would convert what has been done into a something never intended and not within the contemplation of the Act.

NEW BRUNSWICK.

FULL COURT.

APRIL 30TH, 1908.

PURDY v. PORTER.

*Ejectment—Title to Land—Landlord and Tenant—Lease—
Value of Improvements—Appraisement — Verdict of Jury.*

Action of ejectment tried at St. John Circuit in December, 1907, before Mr. Justice HANINGTON, without a jury.

The plaintiff is the lessor in a lease (which is a renewal of a former lease of the same premises, being certain wharf properties with buildings thereon), containing a covenant to renew at the end of the term or pay for improvements. The lessor having determined not to renew, each of the parties appointed an appraiser, and these two appraisers failing to agree appointed a third. The three met and the appraiser of the plaintiff and the third chosen agreed on the sum of \$2,500 as the value of the improvements, which sum the plaintiff tendered, but the defendant refused to accept and also refused on demand to give up possession. The plaintiff then brought ejectment. At the trial His Honor ordered a verdict for the plaintiff, but found that improvements for which the defendant was entitled to compensation had not been considered by the appraisers and the appraisement was not full and complete; and reserved leave to move the full Court to enter a verdict for the defendant, &c.

Accordingly in Hilary Term last, application on the part of the defendant was made to this Court to set aside the verdict for the plaintiff and enter a verdict for the defendant, or for a new trial, and that (under her equitable pleas) the appraisement be set aside and a lease of the demised premises be ordered for a term of twenty-one years from the first of May, 1907.

M. G. Teed, K.C., for plaintiff.

W. B. Wallace, K.C., and L. A. Currey, K.C., for defendant.

BARKER, C.J.:—This is an action of ejectment brought to recover possession of a certain wharf property situate at Indian Town in the City of St. John. It was tried before

Mr. justice Hanington without a jury, who entered a verdict for the plaintiff and assessed the value of the mesne profits at \$250. The property was leased many years ago by one John Cunard to one Robert Cunard. On the expiration of that lease on May 1st, 1886, it was renewed for a further term of 21 years which expired on May 1st, 1907. Previous to that the present plaintiff had purchased the property subject to the lease and the present defendant had become the assignee of the lease. The question in dispute arises out of the following provision—"And it is agreed by and between the parties to these presents that at the end of the said term, the buildings or improvements heretofore erected, or which may hereafter be erected or made by the said Annie Cunard, her executors, administrators or assigns, on the demised premises, shall be valued by two indifferent persons, one to be chosen by each party, which two parties, in case of disagreement, shall choose a third, the appraisement of whom, or any two of whom, shall be conclusive, as to the value of such buildings and improvements; at which time it shall be in the option of the said Charles William K. Cunard, his heirs and assigns, to pay to the said Anne Cunard, her executors, administrators and assigns, such appraised value, or to continue the lease of the said premises to the said Anne Cunard, her executors, administrators and assigns for a further term of twenty-one years, at the same yearly rent, under the covenants in all respects as herein contained and expressed." The plaintiff requiring the use and possession of the premises for the purposes of his own business, determined that he would not renew the lease, but that he would pay for the improvements, under the terms of the covenant I have just mentioned. He accordingly selected one Isaiah Holder as his valuer and gave notice of the appointment to the defendant; and she in turn selected one Herman B. Belyea as her valuer. This was in May, immediately after the termination of the lease. These two persons met, inspected the premises and consulted as to the value of the improvements. Being apparently of the opinion that they could not agree as to the value, they selected a third valuer, one John Edgett. The three met and on the 18th of June, two of them, that is Holder and Edgett, agreed on the sum of \$2,550, as the value of the improvements; they signed a memorandum of appraisement

to that effect and notice of it was given to the parties. On or about the 22nd of June the plaintiff gave the defendant the following notice:—

“To Gertie E. J. Porter:—Please take notice that I have decided not to renew the lease, dated the 20th July, 1893, and made between Charles W. K. Cunard of the City of St. John, as lessor of the one part, and Anne Cunard of the same place, as lessee of the other part, whereby the said Charles W. K. Cunard leased to her the said Anne Cunard, her executors, administrators and assigns, for the term of 21 years from the first of May, 1886, the land in said lease described and of which lease you the said Gertie E. J. Porter have become the assignee and I the said Daniel J. Purdy have become the owner of said land in fee simple, and concerning which Isaiah W. Holder, Herman B. Belyea and John Edgett were valuers, chosen under said lease, and they the said Isaiah W. Holder and John Edgett valued and appraised the buildings and improvements on the demised premises, at the expiration of the said lease, at the sum of \$2,550, under the appraisalment by them made on the 18th day of June, 1907, a copy of which valuation and appraisalment is hereto annexed, and I hereby notify you that I will pay to you the amount of said award and terminate the lease. Dated this 22nd day of June A.D. 1907.

“(Sgd.) D. J. Purdy.

On the same day the plaintiff tendered the \$2,550 to the defendant, but she refused to accept it until she could see Capt. J. E. Porter about it. A second tender of the money was made a few days later, but the defendant refused to accept it, but gave no reasons. About a month later a written demand of possession signed by the plaintiff and dated July 23rd, 1907, was served on the defendant. She refused to give up possession and sometime in August this action was commenced. The principal value of the improvements is in the wharves on the property. These the valuers appraised at \$2,050, and the buildings at \$500. The learned Judge found, and there does not seem to be much dispute on the point, that there was in fact a portion of a wharf or crib work connected with it, which, either by mistake as to its being a part of the improvements to be valued or some misapprehension of some kind in reference to it, was omitted from the property actually valued and not taken into consideration at all. The Judge also found that the unvalued property was in fact a part of the improvements for which

the defendant was entitled to compensation; that it was of substantial value and that the valuers intended to discharge their duty bona fide. It was contended by the plaintiff that this unvalued property was not an "improvement" within the meaning of the covenant and therefore not a subject matter for compensation at all. If that contention could prevail the \$2,550 would represent the whole amount of compensation and there would be an end to the defence. But assuming that the learned Judge was right in his view—and in my opinion he was—the effect is that the value of the improvements has not yet been ascertained; the time at which the lessor could be called upon to exercise his option has not yet arrived, and that the \$2,550 is not the true sum which the defendant is entitled to receive or which the plaintiff is bound to pay.

This action involves simply the question of possession. There is no controversy as to the legal title being in the plaintiff. It is the simple case of a lessor seeking to recover possession of the demised premises on the expiration of the term, from an overholding tenant who has on a demand of possession, refused to surrender it. The lessee claims a right to the possession until either the lease shall have been renewed or until the value of the improvements shall have actually been paid. That is to say that the legal effect of the lease is not only that the tenant shall have possession of the premises during the term demised, but that his right shall, in case the lessor refuse to renew, extend and continue until he shall have actually paid the appraised value of the improvements. Whether therefore the appraisal proceedings are to be regarded as altogether abortive or simply suspended for the time, the legal rights of the parties as to the possession of the premises remain as they were when demand of possession was made in July last. The defendant seeks to sustain her defence on equitable as well as legal grounds, and for that purpose has placed several equitable pleas on the record. It will be convenient to dispose of the legal defence first. The defendants' counsel cited several cases from New York and other United States courts in support of their view, some of which I have not been able to examine. In *re Coatsworth*, 160 N. Y. (1899) 114, is one of the latest of those cited. It appeared there that a lease had been given by which the lessor had the right to renew on giving a specified notice of his intention to do so, but in the event of his not giving any such notice, he

covenanted to pay for the improvements such sum as three disinterested persons chosen by the parties should decide as their value. The Court said: "It consequently appears to us that payment was not required by the terms of the lease as a condition precedent to the surrender of possession, but that the covenant was to pay after the value of the improvements had been ascertained by appraisement under the lease." A distinction is there pointed out between that case and those where the covenants are in the alternative to renew or pay for improvements. *Paine v. Rector of Trinity Church*, 7 Hun, 89, is referred to as an example of this distinction. That case has no bearing on the point under discussion. It was a case of re-entry for non-payment of rent, and the lessee claimed a right to have his improvements valued and paid under a covenant which had reference solely to the expiration of the term. One of the cases there cited is *Van Rensselaer v. Penniman*, 6 Wend. 569, where two covenants were under discussion. In the first lease it was provided that if the heir-at-law or other person having lawful authority should choose to expel or dispossess the lessee, &c., he was to pay for the improvements as they should be valued by indifferent persons. The Court held there that the lessor was entitled to the possession. In the second lease the covenant was similar except that it contained these words, "And on the payment of what the buildings and improvements shall be so valued at, he the said lessee shall yield up the possession thereof." The Court held that under that covenant the lessee was entitled to hold possession until payment. So far as I have been able to examine the other cases referred to in the *Coatsworth* case, the covenants either give to the lessees an absolute right to a renewal, or the option of electing to take a renewal, or to be paid for improvements; or they contain, as in the case last mentioned, language indicating the intention of the parties to be that until payment the possession should not be disturbed.

In *Van Beuren v. Wotherspoon*, 164 N. Y. 368, the covenant was that at the expiration of the term the lessor should have a choice either to grant a renewal of such lease for 21 years at such rent as should be agreed upon, or be established by appraisers in the manner stated therein, or to pay to the lessee the value of the front building on the premises to be ascertained by three disinterested persons. There was also a special agreement as to the giving up pos-

session by the lessee. The parties failed to agree on arbitrators, or on the valuation of the building. The action was brought by the lessor to obtain a judgment fixing the valuation of the lot and building either by a decision of the Court or by the appointment of proper persons to appraise their value, basing their right on the default of the defendant in not procuring the arbitration to settle the value. The action was dismissed on the ground that the plaintiffs had not shewn or established any such diligence upon their part to procure the valuation of the lot and building as provided by the lease. This decision was sustained by the Court of Appeals. As to the possession, they say: "In this connection it is to be observed that by the term of the lease the defendant would not have been justified in surrendering or required to surrender possession until "the plaintiffs elected either to renew the lease upon terms agreed upon or adjusted, or to purchase the building at a price agreed upon or settled in the manner specified." As to the action being maintained, they say: "The plaintiffs were not entitled to the relief sought, unless the defendants were guilty of some improper act or omission to proceed with the arbitration or to agree upon the value of the property in the manner provided by the lease, especially if there was such neglect upon the part of the plaintiffs as is indicated by the evidence and determination of the special term."

In *Nudell v. Williams*, 15 U. C. C. P. 348, the Court gave no positive opinion. They seem to have been influenced by the fact that as the improvements were actually not paid within the month limited for that purpose and by the express terms of the lease, it was thereby renewed, and as such renewal referred back to the end of the old term, even if an action of ejectment brought within the month (as was the fact) could be sustained, no writ of possession could issue. The only authority directly in the defendant's favor is a dictum of Allen, C.J., in the case of *Sears v. The Mayor, &c., of St. John*, 28 N. B. R. 1, at page 33. He says: "The covenant was for the benefit of the lessees, so that if they erected buildings or made improvements on the property during the term, they should not be turned out of possession without being paid the value of their improvements or getting any extension of their lease. But it is only in case the tenant claims to be paid for improvements, that the question of renewal arises and the option of the landlord attaches. There must first be a valuation of the

improvements and then the landlord has the right to determine whether he will pay the valuation or renew the lease." Although the Chief Justice was dealing with a covenant substantially the same as the one I am discussing, the case in no way involved the right of possession and no Judge but himself alluded to that point. His dictum has not therefore the weight it would otherwise have.

This right to retain possession is not an abstract right arising simply out of the relation of landlord and tenant. It must be based upon the particular terms of the lease itself. Each case must therefore be determined with reference to the contract which the parties themselves have made. In the present case there is certainly no express provision for the tenant remaining in possession and there is no language from which any such right can be implied. Covenants are never implied in instruments like this, unless some obvious intention of the parties will be otherwise defeated. In *Hamlyn v. Wood* (1891), 2 Q. B. 491, Lord Esher says: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense I have mentioned."

Sears v. The Mayor of St. John settles many of the rights, and defines clearly the relations, between the parties to a lease like the present one. It is there, so far as this Court is concerned, conclusively settled that covenants such as that we are now considering are made solely for the benefit of the lessee, and they can of course waive them if they choose. They can abandon their improvements to the lessor if they see fit, and they are in no way bound to accept a renewal of the lease. The lessor, however, has covenanted that at the expiration of the term he will do one of two things; he will either pay to the lessee such sum as valuers chosen in a certain way, may fix as the value of the improvements, or he will renew for a further term. The option is entirely and absolutely his. The lessee is not bound to accept a renewal nor can he compel the lessor to give him one, but if it is offered him while he is in possession and he refuses it, his claim for compensation for improvements

is absolutely satisfied. In the reasons for judgment as reported in N. B. Equity Cases 555, Gwynne, J., who gave the opinion of a majority of the Court, says: "As the above covenant of the lessor was inserted wholly and solely for the benefit of the lessees, they could waive the benefit of it. In fact they alone could be the actors in any proceeding for the enforcement of it. The lessor never could compel the lessees against their will to accept a new lease, and so to become tenants of the lessor for a further period of fourteen years, for they entered into no contract whatever in writing or otherwise to accept such a lease at the mere will of the lessor, his heirs or assigns. Now the contingencies, the occurring of which imposed an obligation upon the lessor, his heirs and assigns, under his covenant as to the execution of a new lease were: Firstly, that within and during the term the lessees had erected and put up some buildings and improvements which remained upon the demised premises at the expiration of the term; and secondly, that the lessees should claim to be paid the value of the buildings and improvements so made and remaining on the demised premises. It was only upon these events occurring that the provisions contained in the lease as to the valuation of such improvements and the payment thereof of the execution of a new lease for a further period of fourteen years by the lessor, his heirs or assigns, came into operation." It will be seen, therefore, that not only is the onus of initiating the proceedings required for determining the valuation on the lessee, but that he alone can be the actor in any proceeding to enforce the covenant. The appraisement of the value of the improvements claimed by the lessee is the first step in the whole proceeding. That can only be brought about by the lessee, but until it is taken and settled, the lessor is under no obligation of any kind, and he is in no way in default. Now this has a most important bearing on this question of possession. I am unable to see upon what principle there is to be incorporated into this case a right in the tenant to retain possession of the premises until he chooses to assert a claim to be paid for his improvements and to take the necessary step to enforce it. Short of a delay which a court of equity might consider as equivalent to an abandonment of the claim, I see no limit within which the claim must be made. The lessor

cannot compel the lessee to make a claim and go on with the appraisement proceedings or abandon it altogether and relinquish the benefit of his covenant. There is no express covenant upon which the defendants' claim can rest, and there is, I think no implied one. In *Hutchinson v. Boulton*, 3 Grant 391, a bill was filed by the lessee against the lessor for a specific performance of an alleged contract to renew a lease, for the appointment of a receiver and for an injunction to restrain further proceedings in an action of ejectment which the lessor had commenced. The lease contained a covenant in these words: "And the said A. B. doth hereby for himself, etc., covenant, promise and agree to and with the said C. D., that he shall and will, upon the expiration of this present lease, grant a new lease to the said C. D. for a term of 21 years at a rent not exceeding £21 yearly, if the same shall be lawfully demanded, or, upon neglect or refusal so to do after such demand within one month thereafter, pay for the buildings erected on the said premises such fair price or valuation as may be agreed upon between the parties." There was a provision by which in case of disagreement as to the price it was to be determined. The motion was for the appointment of a receiver. The Chancellor said: "The success of this motion for a receiver depends upon the construction of the covenant to renew contained in the lease, for if the plaintiff be not entitled to have that covenant specifically performed, he cannot of course be entitled to a receiver." He went on then to shew that it was entirely in the lessor's option to give a renewal, and refused the motion.

In my opinion the lease neither expressly nor impliedly gives the defendant the right of possession he claims. Neither can a court of equity give any different construction to the instrument itself. "There is," says the Lord Chancellor, in *Scott v. the Corporation of Liverpool*, 3 DeG. & J. 334, "no equitable construction of an agreement distinct from its legal construction. To construe is nothing more than to arrive at the meaning of parties to an agreement, and this must be the aim and end of all Courts which are called upon to enforce any rights created by or growing out of contract."

It may be urged that if the defendant be thus deprived of her possession she will be left simply with the personal liability of the plaintiff on his covenant as a security for the value of the improvements, which in some cases, at all events, would be entirely inadequate. That, however, is not the result, for the tenant has or may acquire equitable remedies

altogether in addition to his legal ones. The improvements having become a part of the freehold the legal title to them has become vested in the landlord. The tenant, however, has the landlord's covenant to pay for these improvements, and this gives the tenant an equitable lien on the property in case the improvements are not paid for, just as an ordinary vendor has a lien in equity for unpaid purchase money. An equitable lien is neither a *jus in re* nor a *jus ad rem*, but a mere charge enforceable in equity by putting in a receiver, and, if necessary, selling the property. It in no way entitles the party himself to possession except by virtue of a receivership: *Ex part Knott*, 11 Ves. Jr. at page 617; 3 Pomeroy's Eq. ss. 1233 et seq.

On a bill properly framed for the purpose, the Court declares the lien as a basis for the consequential relief to which the holder of a lien is entitled. Speaking without reference to the extended jurisdiction conferred by rules made under the Judicature Act, the Court of Equity never gives a legal mortgagee a receiver, because, by virtue of his legal title, he can take possession himself and enter into the receipt of the rents and profits: *In re Prytherch*, 42 Ch. D. 590.

Though the defendant has no legal title to the premises, yet as he is now actually in possession, claiming compensation for his improvements, we ought not I think to disturb that possession, provided he is in a position to invoke the aid of the Court for the enforcement of his lien, because it would be necessary merely to substitute his possession for that of a receiver for him: *Unity Joint Stock Mutual Banking Association v. King*, 25 Beav. 72.

Is the defendant now in a position to ask for a receiver? I think not. She can no more file a bill than she can bring an action on the covenant until the plaintiff is in default in some way. His liability is to pay a value to be determined in a specific manner and by a separate tribunal, and until that value is ascertained he cannot be in default for non-payment. The plaintiff has a right to pay that sum instantly that it is determined, and prevent his property ever being charged with it. In *Milnes v. Gery*, 14 Ves. 400, the bill was filed for specific performance of a contract to sell a certain property at a price to be determined precisely by valuers to be chosen as is provided in this lease. They disagreed and they could never agree on the third valuer. The plaintiff therefore filed his bill asking the Court to appoint a person to make the valuation or ascertain it in some other man-

ner. The Master of the Rolls, at page 407, says: "The agreement that the price shall be fixed in one specific manner certainly does not afford an inference that it is wholly indifferent in what manner it is to be fixed. The Court, declaring that the one shall take, and the other shall give, a price fixed in any other manner, does not execute any agreement of theirs; but makes an agreement for them, upon a motion, that it may be as advantageous as that which they made for themselves. How can a man be forced to transfer to a stranger that confidence which upon a subject materially interesting to him, he has reposed in an individual of his own selection? No substantial difference arises from the circumstance that in this case the decision may ultimately fall to an empire, not directly nominated by the parties, as through the medium of the original nominees they had an influence upon the choice. No one could be chosen without the concurrence of the persons in whose judgment they reciprocally confided." That this clause is a condition precedent to any right of action at law is I think settled by *Scott v. Avery*, 5 H. L. C. 811, and numerous other cases. The contract is not to pay the value of the improvements, but such sum as the valuers shall fix as the value, and their appraisal is conclusive.

Scott v. The Corporation of Liverpool, 3 DeG. & J. 334, may be cited to shew that precisely the same rule prevails in equity, subject to some exceptions which I shall presently mention. In that case the Lord Chancellor says: "The question is, whether the plaintiffs have shewn that they have a present right to an equitable remedy." The principle, he says, is stated by Lord Cranworth in these terms: "If I covenant with A. B., that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award, as the amount of damage sustained by him, then until J. S. has made his award and I have omitted to pay the sum awarded, my covenant has not been broken and no right of action has arisen." The Lord Chancellor continues: "And I may ask with him, 'does any right of action exist until the amount of damage has been ascertained in the specified mode?' In order to determine this question we must refer again to the claim of the specification upon which it depends. Now suppose that the contractors had chosen to agree that they would be paid for their work not a specified sum nor upon measure and value, but such an amount as the company's engineer might fix, can there be a doubt that

such a contract (though a very important one) would be binding and that the contractor would be bound to submit entirely to the discretion or even the caprice of the person whom he had thus clothed with this arbitrary authority?" The bill in that case charged fraud in the engineer in refusing his certificates. This charge was, however, abandoned at the hearing and the bill was dismissed on the ground that the Court could not fix the amount. In affirming the decree the Lord Chancellor says: "If the Court were to assume the jurisdiction which is prayed, it would not be enforcing the contract of the parties acting in direct opposition to it." An exception to this rule, so far as the equitable remedy is involved, may be found where there has been fraud, as was charged in the case just mentioned, or where the person sought to be charged with the liability has by some act or default blocked the action of the tribunal agreed upon for the assessment of the liability. As to such a case the Lord Chancellor says: "It was said that this clause leaves the contractors wholly at the mercy of the engineer, who is only to determine the amount they are to receive 'when the contract shall have been terminated, or as soon thereafter as the engineer may think convenient,' and it is urged that he may consult his own convenience and indefinitely postpone his determination. I do not think that the proper construction of these words is, that they relate to the personal convenience of the engineer; but, be that as it may, if he were to decline to enter upon the question, or by any affected delay or any improper practice of any kind were to attempt to evade a decision, a Court of Equity would know how to deal with such a state of things, although a Court of law might be powerless to afford redress."

In cases such as *Berrie v. Woods*, 12 O. R. 693, cited at the argument, the course is simple. There was no outside tribunal there agreed upon to ascertain the value. The covenant was general to pay one-half of the then value of any permanent improvements, etc., and the Court, in the event of the parties not agreeing, simply referred it to the Master to fix the amount. As to such cases the M. R. says, in *Mines v. Gery*, 11 Ves. 400, at p. 407: "The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value are pointed out; there is nothing, therefore, precluding the Court from adopting any means adapted for that purpose." In view of the facts of this case, it seems impossible, under the

authorities I have mentioned, to say that the defendant is at present in a position to enforce either his legal or his equitable remedies, nor will be so until the valuation proceedings shall have been completed or the necessity for them been obviated in some way. Whether the valuation already made is altogether abortive, or whether it is simply an incomplete piece of work, is a question upon which I shall express no opinion, for I think it is in no way necessary for a determination of this case. The condition of things is not due to any default of the plaintiff. He took the initiative in appointing a valuer where he need not have done so. He facilitated matters in every way and he lost no time in tendering the amount fixed by the valuers. The mistake is, perhaps, not due to the fault of any one in particular; at all events the plaintiff is not responsible for it. It is not suggested that he has done any one thing to impede a speedy settlement of the amount to be paid. He has rather facilitated the proceedings than obstructed them. It rests with the defendant herself when she shall be in a position to enforce her remedies. I have discussed this question of the defendant's equitable rights at greater length than is really necessary for a determination of this particular case, but I was desirous of shewing that a default in the plaintiff in performance of his covenant would give rise to valuable remedies in equity for securing payment of the value of the improvements, with which the present possession of the premises has nothing to do. At one time during the argument we were asked to make a declaration to the effect that the defendant should have a lien on the premises for the value of these improvements. This was subsequently abandoned as being altogether unnecessary in this present case, as the plaintiff was a responsible man and his personal covenant was amply sufficient for what he might in any way become liable to pay under it. There are reasons why such a declaration should be made in a case like the present. This is an action of ejectment in which is involved wholly the right of possession. Sections 287 and 289 of the Supreme Court Act, to which I have already referred, make provision for an equitable defence, that is to say, so far as there are any equities between the parties which would prevent the plaintiff from sustaining his action, or which would prevent him from issuing a writ of possession if he did sustain it; the Court in this action exercising an equitable jurisdiction, is authorized to declare and enforce these equities by way of

relief. Section 287, I think, makes this clear. It provides that when the defendant "has a defence to the action on equitable grounds he may state by way of defence the facts which entitle him on equitable grounds to retain possession, and his statement of that defence shall begin with the words "for a defence on equitable grounds." Section 289 gives the defendant power to ask for relief, and the Court power to grant or withhold the relief prayed for, and generally to determine all questions between the parties arising in the action according to law. This can only have reference to matters which would amount to a defence to the action, or which, in the language of sec. 287, would entitle the defendant to retain possession. But if the defendant is not in a position to file a bill in equity to enforce his equitable lien, as in my opinion he is not, then a mere declaration of a lien which may, unless waived in the meantime or discharged by payment or otherwise, become enforceable at some future time, would not effect the present possession one way or the other, and, therefore, it is no defence to this action, nor does it entitle the defendant to retain the possession. Section 118 of "The Supreme Court in Equity Act," which is copied from the English Chancery Procedure Act of 1852, is as follows: "No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief." Under this section the Court did not, as a rule, at all events, make declarations of future rights (*Lady Langdale v. Briggs*, 8 DeG. M. & G. 391), or rights depending upon circumstances which might never arise (*Hampton v. Holman*, 5 Ch. D. 183). More than this the section was held only to apply to cases where there was a present right to the relief consequent upon the declaration, though the party entitled to it might not ask it (*Rooke v. Lord Kensington*, 2 K. & J. 753; *Brooking v. Maudslay*, 38 Ch. D. at p. 647). If the defendant is not at present in a position to enforce his claim for compensation, either at law or in equity, there is nothing in this case to make it an exception to a rule so general in its application. The defendant admits the plaintiff's ability to pay; the plaintiff has given some evidence of his willingness, and he is surely entitled by payment of the defendant's claim when he can ascertain the amount of it, to prevent his property being encumbered by a lien when the delay in ascertaining the amount due is

not attributable in any way to him. However, we are relieved from any question on this point as the defendant has withdrawn all claim to the declaration, as it will serve him no useful purpose.

What I have said as to the equitable defence is equally applicable to the defendant's application to have the valuation set aside. It has no bearing on the question of possession, and for the purpose of determining that question it is immaterial whether it is set aside or not. The defendant, as appears by his notice of motion and by his argument, was not anxious as to any lien on the premises as a security for his compensation, if a present right of possession did not go with it. Neither was he anxious to set aside the valuation except for a result which he claimed would follow, that is, that the valuation proceedings were then ended and he was entitled to a decree compelling the plaintiff to renew the lease. I do not agree with either proposition. I think the verdict must stand.

WHITE, J.:—This is an action of ejectment tried without a jury at the St. John Circuit before Mr. Justice Hanington, who found for the plaintiff.

The facts are as follows:—By deed dated May 1st, 1849, John Cunard demised to Robert Cunard, for the term of 21 years from the date of the lease, a lot of land, bounded on the west by the River St. John, and situate in what is now the City of St. John, but was then part of the Parish of Portland. The lot is mainly valuable by reason of the wharf privileges it affords. At the date of the lease to Robert Cunard there were no improvements on the land. The lease contained a covenant relating to improvements which was substantially similar to the covenant directly in question in this suit. Robert Cunard took possession under this lease, and continued to occupy throughout the term, and until the 11th of August, 1865, on which date John Cunard, by deed, redemised the lot to Robert Cunard and his assigns, for a further term of 21 years from the first day of May, 1865. This last mentioned lease does not, on its face, purport to be executed by way of renewal of the first one, but the yearly rent reserved is the same in both, and the second lease contains a covenant to renew and pay for improvements, similar to that in the first one, but with this difference—that whereas the first covenant referred to “any buildings or improvements erected by the said Robert Cunard on the demised

premises," the corresponding words in the second lease are, "the buildings or improvements heretofore erected or which hereafter may be erected or made by the said Robert Cunard, his executors, administrators or assigns on the demised premises." Robert Cunard died prior to July, 1893, and by his last will, which bears date the 5th day of January, 1891, his widow, Anne Cunard, became sole legatee of all his real and personal property. John Cunard having also died leaving, as his successor in title to the reversion, his son Charles W. K. Cunard, who was an infant, Anne Cunard, in July, 1903, applied to the Equity Court for an order requiring Charles W. K. Cunard, by the guardian of his person and estate, to either renew the second lease, or pay for the improvements as provided for therein. In compliance with an order of the Judge in Equity, made upon such application, Charles W. K. Cunard, by his guardian, Freeman W. Wisdom, executed a lease, under seal, bearing date the 20th day of July, 1893, which is stated therein to be made by way of renewal of the second lease, and whereby the lot was demised to Anne Cunard and her assigns, for the term of 21 years expressed in the habendum clause, in the words following:—"To have and to hold the said lot of land and premises hereby demised and the appurtenances unto the said Anne Cunard, her executors, administrators and assigns, for and during the term of 21 years from the first day of May, which was in the year of our Lord one thousand eight hundred and eighty-six."

The lease contained the following covenant:—

"And it is agreed by and between the parties to these presents that at the end of the said term the buildings or improvements heretofore erected, or which may hereafter be erected or made by the said Anne Cunard, her executors, administrators or assigns, on the demised premises, shall be valued by two indifferent persons, one to be chosen by each party, which two parties, in case of disagreement, shall choose a third, the appraisement of whom or any two of whom shall be conclusive as to the value of such buildings and improvements; at which time it shall be in the option of the said Charles William K. Cunard, his heirs and assigns, to pay to the said Anne Cunard, her executors, administrators and assigns, such appraised value, or to continue the lease of the said premises to the said Anne Cunard, her executors, administrators and assigns, for a further term of 21

years, at the same yearly rent, under the like covenants in all respects as herein contained and expressed."

By deed dated the 22nd day of September, 1893, Anne Cunard assigned the lease, term and premises to Albert E. Cunard and Emma Cunard, who, by deed dated the 10th day of August, 1896, assigned the same to the defendant. Charles W. K. Cunard, in March, 1907, by deed conveyed to the plaintiff the lot in question, subject to the outstanding lease. The plaintiff gave the defendant written notice, dated May 2nd, 1907, informing her that he was the owner of the reversion, and that he had appointed Mr. Holder as appraiser in his behalf, and requiring her to appoint an appraiser on her part, to act with Mr. Holder in valuing the buildings and improvements on the land. The defendant, by writing under date 21st May, 1907, notified the plaintiff that she had appointed Mr. Belyea on her behalf.

The two appraisers thus selected met, and having viewed the premises, failed to agree on a valuation, and decided to call in the aid of a third appraiser. They accordingly selected Mr. Edgett as such third appraiser, and he, upon their request, accepted the appointment. Neither party appeared before the appraisers, or submitted, or were asked to submit, any evidence or claim as to the value or extent of improvements; except that Mr. Holder states his instructions were, to "value the buildings and improvements on the place," and Mr. Belyea says his instructions were "to value the wharf and all the improvements," and that he so informed Mr. Holder. At the time of appraisal, there was upon the lot a wharf, two dwelling houses, and two sheds, all of which, the defendant claims, were valuable improvements, and should have been appraised as such.

This wharf, on its western or front portion, is constructed of spiling and timber, covered with a plank flooring which extends back from the face of the wharf some forth or forty-five feet. Between this floored portion and the end next the shore—a distance of about sixty feet—the wharf is formed mainly of earth and stone. When first constructed by Robert Cunard, more than thirty years ago, this portion consisted of log crib work, having ballast floors loaded with stone, to sink the wharf and keep it in position. Partly, it would seem, owing to the settling and decay of this crib work, and partly to make the structure more capable of resisting freshets, this whole portion has been filled and covered with earth and stone to a depth of several feet, and so that, while the

testimony shews that part of the old crib work is still there, it is in great part, if not wholly, concealed from view. Except the stone ballasting mentioned, all, or practically all, of this earth and stone filling was placed there free of charge by outside parties, who were allowed by the then lessee, Robert Cunard, to use the wharf as a dumping ground for earth and stone which they wished to be rid of. The lessee, however, bore the expense of such levelling and adjusting of this filled-in matter as was from time to time necessary. The two dwelling houses mentioned were built by the defendant, about 1898, to replace two others, which, having been erected by Robert Cunard, had been then recently burned. The whole of one of these houses, and the L of the other, rests on the earth-filled portion of the wharf. An award of \$2,550 was made in writing, under date June 15th, 1907, by two of the appraisers, Holder and Edgett, Belyea having refused to sign it. This award purports to be made for, and in respect of, "the buildings or improvements upon the lands and premises hereinbefore set out under the terms of the said lease." From the evidence on the trial, however, it appears that this amount was made up by allowing \$2,050 for the dwelling houses, and \$500 for the plank-floored part of the wharf and the two sheds, but that nothing was allowed for or in respect of the earth-filled part of the wharf.

The plaintiff served the defendant with notice of this award, and made a tender to her of the \$2,550 awarded, which she refused to accept, whereupon, having first formally demanded possession, he brought this action. In addition to denying plaintiff's legal title, the defendant, by plea, asserts the right to hold possession on equitable grounds; and under the provisions of C. S. 1903 c. 111, ss. 287-289, asks to have the award set aside, and a renewal lease decreed to be executed.

The first question to be determined is as to the sufficiency of the appraisement. The defendant claims the award is bad upon two grounds: First, because the third appraiser was appointed by the other two, and not by the parties themselves; and secondly, because the appraisers failed to appraise or award any sum in respect of the earth-filled portion of the wharf. I think there is nothing in the first ground.

The clause in the lease governing the appointment of the third appraiser reads: "One to be chosen by each party, which two parties in case of disagreement shall choose a third, the appraisement of whom, or any two of whom, shall

be conclusive, etc." The words "whom, or and two of whom," in this clause evidently refer to the "two parties" who, "in case of disagreement, shall choose a third."

As to the second ground: while it is beyond doubt that the appraisers awarded nothing in respect of this earth-filled wharf, it is, to my mind, far from being made clear by the evidence why they took that course. If, having exercised their judgment upon this matter they honestly concluded, although wrongly, that this piece of wharf in no degree enhanced the value of the lot, and, therefore, allowed nothing for it, I cannot think their finding could be successfully impeached for such error in judgment. Having selected the appraisers for the express purpose of getting their judgment as to value, the parties are bound by that judgment when given. But if, on the other hand, the appraisers made no finding as to the value of this portion of the wharf, in the belief that, because it was mainly or largely constructed of earth, it could not in any case be considered an "erection or improvement" requiring appraisement under the covenant, then, if this earth-work does in fact add value to the land, I think the award is bad. Bearing in mind that this lot was, in 1840, merely part of the beach, or shore, of the river; that its value consists chiefly in its being a good site for a wharf; and that a wharf has been built upon it, which adequately answers all the purposes which a wharf at such a place is required to serve; then, in determining whether such a structure is an improvement or not, what difference can it make whether it be constructed of wood, earth, stone or iron, provided always it is of such a character as to enhance the value of the lot. But the learned Judge who heard the case, and who also viewed the premises, having found, as a fact, that this earth-filled portion of wharf is an improvement, and that part of the old timber crib-work is still there; and that this timber with the earth filled in above it raises the surface of the wharf several feet above the water line, and higher than was the original surface of the land: and having also found, as a fact, that the value of this portion of the wharf should have been, but was not, adjudicated upon by the appraisers, his finding as to these questions of fact should, I think, stand.

The learned counsel for the plaintiffs put forward upon the argument the contention that, by the terms of the covenant in question, the only improvements which required appraisement are such as were made during the currency of the last lease, although I thought at the time, perhaps

wrongly, that he did not insist upon this point very strenuously, he did not abandon it, and it therefore has to be disposed of. The clause in the covenant upon which he based this contention reads as follows:—"That at the end of the said term, the buildings or improvements heretofore erected, or which may hereafter be erected or made by the said Anne Cunard," etc. I think it quite clear, that neither the grammatical or legal construction of these words is that which the learned counsel seeks to place upon them. Grammatically, the words, "by the said Anne Cunard," qualify the words, "or which may hereafter be erected or made," and do not—certainly do not necessarily—qualify or limit the words "buildings or improvements heretofore erected." It is a well recognized rule of law, that ambiguous words in a covenant are to be taken most strongly against the covenantor, while at the same time regard is to be had to the intention of the parties, so far as the same can be gleaned from the context and surrounding circumstances: *Fowle v. Welsh*, 1 B. & C. at p. 35; *Browning v. Wright*, 2 Bos. & P. at p. 22.

Applying this rule of construction, and bearing in mind that the lease purports on its face to be made in renewal of a former one; and, that when it was executed there was then upon the lot valuable improvements, made during the currency of the former lease, by the tenant thereunder, Robert Cunard; and that such former lease contained a covenant providing for payment of these improvements, or a renewal of the lease "under the like covenants in all respects as therein contained," and, that Anne Cunard became entitled to, and received, the lease to her, for the sole reason that she was successor in title to Robert Cunard, there can, I think, remain no doubt whatever that the covenant in question calls for appraisal of all improvements upon the lot, whether made before or after the execution of the last lease.

Having reached the conclusion that the appraisers failed to make a full appraisal, as the lease calls for, it remains to be considered what effect, if any, such failure has upon the plaintiff's right to possession.

The grounds upon which the defendant claims the right to possession may be summarized as follows:—(1) That by the covenant in question it is impliedly, if not expressly stipulated, that she could so continue in possession; (2) that the defendant has become entitled to a renewal of the term, through the plaintiff's default, and, therefore, is entitled to

possession; (3) that the defendant has some equitable right to remain in possession, as security that she will either be paid for the improvements, or receive a renewal of the lease.

As to the first ground, it is not suggested that the covenant in question expressly, and in terms, provides that the defendant may continue in possession until the improvements are paid for, or a new lease given, but it is claimed that such a provision is necessarily to be implied. Now it is a rule of law that a covenant is not to be implied where there is an express covenant upon the same subject matter: (*Elphinston on Deeds*, Rule 152, and cases there cited); much less is such covenant to be implied when it is at variance with other express provisions of the instrument. Here the habendum in the lease expressly limits the term demised to 21 years from May 1st, 1886. So that we are asked to imply from the covenant a provision which would extend the tenancy beyond the term limited by the habendum, and this too, notwithstanding it is a well recognized rule of conveyancing that the special office of the habendum is to limit the term conferred. But even if there were no express provision in the lease to forbid such implication, what is there in the covenant from which we must imply an agreement that the defendant may hold possession as she claims to do? It is urged on her behalf that inasmuch as the plaintiff is compelled, or at least allowed, by the covenant, to wait until the improvements are valued, before being called upon to exercise his option as to whether he will renew or not, there is always a possibility, until such option is exercised, that the lease will be renewed. If therefore the lessor can resume possession between the expiration of the old and the execution of the new lease, the tenant will, notwithstanding such renewal, be deprived of the enjoyment of part of the term given her by such new lease, while, at the same time, she will be compelled to pay rent, under the new lease, for some period during which she was so out of possession. This argument strikes me as having some force, and as touching a point of some difficulty in this case. The option given the lessor is to pay for the improvements "or to continue the lease." If then, it is the necessary, as it seemed to be the natural, meaning of these words, that the new lease is to run from the expiration of the old one it must follow, in the event of a renewal, that if the defendant has been deprived of possession, between the end of the expired term and the execution of the new lease, she will have to pay rent, under

such new lease, for some period during which she was out of possession.

But, on the other hand, it is likewise true that if the defendant continues in possession after the end of the expired term, then, in the event of the lessor exercising his election to pay rather than to renew, he could get no rent for the time the defendant so occupied; because the lease makes no provision for any such rent. Moreover, if the new lease is to run from the end of the expired term, then, as soon as it is executed, the defendant will, by its terms, be deemed to have held as tenant thereunder, for the very same period, during which, as she now claims, she holds as tenant under the old lease. I do not think there is sufficient in the argument of the defendant to outweigh the other more weighty and opposing considerations which present themselves against her claim to hold present possession.

The defendant, in further support of her contention, points to the clause in the covenant, "at which time it shall be in the option of the said Charles William K. Cunard, his heirs and assigns, to pay," etc., etc., "such appraised value or continue the lease," etc., etc., and argues therefrom that the plaintiff has no power to exercise his option until after the appraisement is made. But I much doubt if these words suffice to support the construction the defendant seeks to build upon them. The covenant, in so far as it provides that the defendant shall be paid for her improvements or given a new lease, is in her favour, and for her protection: but, in so far as it gives the plaintiff the privilege of waiting until after the appraisement before he is called upon to decide whether he will renew or pay for improvements, is wholly in his favour. Why, then, may he not waive that which is for his benefit alone? Why may he not at once, upon the expiration of the term, and without waiting until the improvements are appraised—though he might unquestionably so wait, if he wished to do so—make a binding election one way or the other. If he is determined to renew, why hold him compelled to go on with the appraisement, since the defendant can derive no benefit therefrom? On the other hand, why cannot the plaintiff, before appraisement, make a binding election to pay such value as the improvements may thereafter be appraised at? If, before appraisement, he tendered a new lease, would he not thereby be discharged from his covenant?

But assuming—without so deciding, however—that the effect of the words last quoted, is, to compel the plaintiff to wait until after the appraisal before he can make his election, it does not by any means necessarily follow that, pending the exercise of his option, the defendant can continue to hold possession of the premises.

In *Doe dem. Davenish v. Moffat*, 15 Q. B. 257, it was held no defence at law to an action of ejectment, brought by the lessee against the lessor, to recover possession upon the expiration of the demised term, that the lessee had, by the terms of the lease, an option to renew upon notice, and that the requisite notice had been given, so that the lessee had become absolutely entitled to a renewal of the term. The Court there held that the right to a renewal gives the tenant no interest in the land, and no right to continue in possession after the end of the original term. Now it seems to me beyond question, that a lessee whose right to renew depends upon the contingency which may or may not so fall out as to call for such renewal, can stand in no better position, as regards his right to hold over after the expiration of the old, and before the granting of a new term, than would the tenant whose lease gave him an absolute right to a renewal in any event. Now then, can the defendant successfully claim an implied right, under the covenant, to continue in possession, because she may become entitled ultimately to a new lease, when, if she were absolutely entitled to it, under the covenant, she could not hold possession until the lease had been in fact executed.

But *Doe dem. Davenish v. Moffat* is the decision of a common law Court, whereas by our C. S. 1903 ch. 111, secs. 287-289, the defendant may set up any equitable grounds which would entitle her to hold possession. Now, in equity, the Court regards that as done which it would decree done, and, therefore, treats a tenant who is entitled to a renewal term as having the like right of possession which he would have had under a new lease duly executed. Accordingly, in *Walsh v. Lonsdale*, 21 Ch. Div. 9, it was decided that a tenant holding over under an agreement for a renewal lease, which would be specifically performed, is not, since the Judicature Act, a tenant from year to year. But, in order to come within the shelter of this equitable principle, the defendant must shew that by some act or default of the plaintiff, she has become entitled absolutely to a renewal of the lease, which brings us to consideration of the second ground

mentioned, that is to say, the defendant's claim that she has become entitled to insist upon a renewal.

If the plaintiff has lost his option, and can no longer elect to pay for improvements, but is bound to renew, this can only be because of some act or omission on his part. It may indeed be, that, having demanded possession and begun suit for its recovery, he is no longer in a position to insist upon the defendant accepting a new lease, and has become absolutely bound to pay for the improvements, but in what way has he become bound to renew the term? He has taken all the steps prescribed by the lease as preliminaries entitling him to pay for the improvements. He is in no way in default. He has been guilty of no laches. Promptly upon the expiration of the demised term, he appointed his appraiser, and gave the defendant notice which resulted in the appointment of an appraiser by her. The two appraisers thus appointed, failing to agree, selected a third. The fact that the three thus chosen have failed to appraise all the improvements to payment for which the defendant is entitled, cannot be charged to any act or default of the plaintiff. Election depends upon intention, evidenced, of course, as all intentions necessarily must be, by some acts or act. How then can the plaintiff be held to have elected to renew from the mere fact that there was no sufficient appraisal?—when he has done all he was bound to do, or indeed could do, to procure a proper appraisal. If either of the parties is in default, it would seem to be the defendant. She is the party in whose interest the covenant was inserted in the lease. She is as much bound by that covenant as is the plaintiff to appoint appraisers. She is to select one, the plaintiff another, and in case of disagreement the two thus chosen are to select a third. If she is not bound to take the initiative in obtaining appraisal she may, at least, do so equally with the plaintiff. As appears by the *Mayor, etc., of Saint John v. Sears*, 18 S. C. R. 702, she may waive any claim to improvements, and refuse to accept a renewal of the lease. If she claims improvements it is for her to specify what these are. If the appraisers fail to adjudicate upon all the improvements for which she is entitled to be paid, such failure, if chargeable to either party, rests upon her, at least as heavily as upon the plaintiff. In *Irwin v. Simonds*, 11 N. B. R. 190, the covenant was that of the lessor, and required the buildings to “be valued by disinterested persons.” Under such a covenant (as was decided in *Gilbert v. Smith*,

18 N. B. R. 211), the lessor could appoint all of the appraisers. In the *Mayor, etc., of Saint John v. Sears*—as in the present case—the covenant was that of both lessor and lessee, and required each covenantor to appoint an appraiser; and King, J., in the course of his judgment in that case (28 N. B. R. at p. 19), referring to this difference in the covenant, says: “I might also observe with regard to *Irwin v. Simonds*, that in it there was no covenant or agreement whatever on the part of the lessee (as expressed by Ritchie, J., at p. 194), that he should in any way assume the initiative in this matter. It may possibly be that, if the covenant in that case had been like the covenant here, it might not have been concluded as a matter of fact that Mr. Simonds, by his omission to have the property value, and by his acts at and after the expiration of the lease, clearly indicated his intention to continue the lease for a further period.” Allen, C.J., in his judgment in the same case (at p. 25) likewise emphasizes the difference between the two covenants. In connection with this case of *The Mayor, etc., v. Sears*, it is, I think, worthy of remark in view of the present defendant's contention, that, although that case was very fully discussed both in this Court and on appeal, and the whole question involved was as to the nature of the tenancy under which the defendant then held over for a year after the expired time, it was never even suggested either by counsel on argument, or any Judge in giving judgment, that the defendant was entitled to hold over for the whole, or any part of such year, because the plaintiff had failed to have the improvements appraised. In this case I cannot see that the plaintiff has done, or omitted to do, anything whereby he has lost his option to pay and become bound to renew the lease.

Then as to the third ground:—What other equitable rights apart from those already considered, has the defendant, under which she can hold possession? It is claimed that, as the covenant admittedly runs with the land, it was never contemplated by the parties to the lease and would work injustice to the defendant, to force her to look to the plaintiff's personal responsibility alone for recovery of the value of the improvements. But, if it were necessary in order to protect the defendant, and if she had shown herself entitled to protection as against the plaintiff, the Court, exercising the powers of a Court of Equity, as it may do by the statute under which the equitable plea is framed, could declare the value of the improvements to be a lien or charge upon the

property. This is what was done in *Berrie v. Woods* (12 Ont. R. 693). An equitable lien does not, however, carry with it possession of the property charged. In this case, the defendant, on the argument expressly stated by her counsel in reply to questions by the Court, that the plaintiff is financially well able to pay any claim for improvements, and that, in the event of this Court deciding against her claim to possession, she did not ask to have the value of the improvements charged upon the land. But if the defendant is secure of payment for her improvements, what more is she entitled to?

Bearing in mind that, in the absence of a covenant to pay for improvements, a lessee has no claim to such payment, it is apparent that the object of the covenant here is to insure the lessee compensation for improvements she may make on the premises, in case the lease be not renewed. On the other hand, as already stated, the option to renew and thereby avoid, or rather postpone payment for improvements, is a provision in favour of the lessor. Hence, if the defendant is, in the end, paid for her improvements, she will get all she is entitled to; and if, in the meantime, the Court makes her secure of such payment; or if, as is admittedly the fact, she is thus secure without the aid of the Court, what injustice does she suffer? I can see none. Then why should a Court of Equity lend its aid to deprive the plaintiff of his legal right to possession, in order to give the defendant protection, which she does not require, against the plaintiff, who is in no way in default?

Two New York cases, *In re Coatsworth*, 160 N. Y. 115, and *Van Beuren v. Wotherspoon*, 164 N. Y. 368, were cited by the defendant, as was also the case of *Nudell v. Williams*, 15 U. C. C. P. 348. As the learned Chief Justice reviews these cases very fully in the judgment which he will deliver, it is not necessary for me to further deal with them. For the reasons I have given, I think the plaintiff entitled to possession, and that the verdict in his favour should stand.

It only remains to consider the prayer of the defendant set forth in his plea, that the award made by the appraisers shall be set aside. Having found the plaintiff entitled to possession, notwithstanding the invalidity of the award, what interest will be served by formally decreeing that the award be set aside. No doubt the powers conferred upon the Court by sec. 289 of the Supreme Court Act, are sufficiently broad to enable us to set aside the award in this action, if it were

necessary to do so, to afford to the defendant any equitable relief to which she had shown herself entitled, and which, being granted, would defeat the plaintiff's legal right to possession. For example, the Court could, I think, under this section, grant relief against forfeiture for non-payment of rent, or breach of covenant, where the defendant, in an action brought to eject him, because of such forfeiture, shows himself entitled to such relief. And in the present case, had the defendant shown herself entitled absolutely to a renewal lease, the Court could, I think, decree such renewal. But to order the award of the appraisers set aside, would not entitle the defendant to possession; nor would it, so far as I can see, in any way affect the rights of either party. If this were an award which could be enforced without suit, if for instance it were an award which could be entered upon the *postea* and enforced as a verdict—then there would be something gained by having it set aside. But to enforce this award, it must be declared upon as a cause of action, or be set up as a defence by plea, and in either case its invalidity can be shown in answer. In *Doe dem. Turnbull v. Brown*, 5 B. & C. 384 (referred to in *Russell on Awards*, 5th ed., p. 664), Abbott, C.J., says: "This is clear, when an award may be considered as a nullity and nothing can be done upon it but by suit, the Court will not interfere to set aside the award, because any action brought to enforce it must fail."

I, therefore, do not think that we should, in this action, set aside the award.

HANINGTON, LANDRY, and McLEOD, JJ., agreed with BARKER, C.J.

Verdict for plaintiff sustained.

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NOVA SCOTIA.

SUPREME COURT.

DRYSDALE, J., AT CHAMBERS.

JULY 13TH, 1908.

RE PORT HOOD COAL CO.

*Evidence—Commission to Examine Witnesses—Enlargement
of Time for Return—Winding-up Act.*

On motion before LONGLEY, J., at Chambers, to vary the order for a commission to take evidence at Toronto, judgment was delivered as follows:

In this matter a certain claim is in contestation. The Imperial Trust Company has filed a claim which the liquidator is contesting. The claimants have their place of business in Toronto, and their chief witnesses there. An order was granted for a commission to take plaintiff's evidence at Toronto, and it appears that some witnesses have already been examined under this commission. The plaintiff's solicitor applied to Mr. Justice Meagher at Chambers for an order enlarging the time for return of this commission, which has already according to the original order, expired, which was refused—so far as I can learn—upon the ground that insufficient grounds had been shewn and great delay had already occurred. Last Chambers day the plaintiffs' solicitor applied to me, under a large number of affidavits, to vary the original order for a commission, on the ground that a mistake had been made in the issue of it. I conceived the application was an indirect means of inducing me to reverse the judgment of my brother Meagher, and I did not consider there

had been any error in the original order, but that the plaintiffs might not be in any way prejudiced, I adjourned the hearing, in order that the matter might come before Mr. Justice Meagher, the regular Chambers Judge, and likely to be the trial Judge, in order, as some additional facts had been brought out in plaintiff's affidavit, he might exercise his discretion in modifying his former ruling, if he saw any just grounds for so doing.

The next day plaintiff's solicitor applied to me for an *ex parte* order for the issuing of subpoenas at Toronto for the examination of witnesses there on behalf of the plaintiffs. A careful examination of the Winding-up Act induces me to believe that such power is vested in this Court, and it may be that I should have felt at liberty to have exercised this power if I had not been aware that a commission had been ordered and was still outstanding. It seems to me that the exercise of this power in the face of this knowledge is open to the objection of seeking to override the commission and to give the plaintiffs a sudden and, under the circumstances, possibly an irregular alternative to a commission whose scope for some reason has become somewhat doubtful. I recognize fully how the plaintiffs are pressed for time, the trial having been set down for the 29th inst., and I regret that I cannot see my way clear to giving this present order. I think it is open to grave objection. I am, however, exceedingly anxious that no injustice should be done the plaintiffs, and, as ultimately the full responsibility of trying this cause and providing all just means of meeting the ends of justice will rest with the trial Judge, I am desirous that any conclusions I have reached in this matter will not in any way stand as a bar to any action he may in his discretion see fit to take. If he, being satisfied that the commissioner is for any reason likely to prove unavailable for the plaintiffs, and that his evidence may be obtained by issuing subpoenas to his witnesses in Toronto, my judgment at this stage I wish in no way to stand in the way of exercising his discretion, involving as it would the further postponement of the trial.

Subsequently (July 3rd) a further application was made to the learned Judge by counsel on behalf of the claimant for the appointment of an examiner at Toronto, upon which the order now complained of was made.

The present application before DRYSDALE, J., at Chambers, was to rescind the last named order.

DRYSDALE, J.:—This is an application made to me under summons dated 7th July, to set aside an order made by Mr. Justice Longley, appointing a special examiner in Toronto for the examination of witnesses on a claim made by the Imperial Trust Co., now being contested by the liquidator. This order was made by the learned Judge *ex parte*, and under the following circumstances.

The trust Company claim to rank in the winding up as creditors for \$250, and after objection by the liquidator the solicitor of the Trust Co. on the 31st of March, obtained a commission to examine witnesses in proof of the claim, in Toronto. On the same day the matter in contest was set down for hearing here by the liquidator for April 21st. On the granting of the commission on March 31st it was made returnable on April 18th, but some delay occurred in settling the long order, which in fact did not issue until April 10th, and was not sent out until some days later, about the 21st. Meantime the time for the trial had been extended here. Under the commission some witnesses were examined in Toronto without objection to the return day in the commission having been passed before its receipt by the commissioner, but afterwards counsel for the liquidator objected to the commission's power to proceed, as the day had passed before which he was, as indicated on the face of the commission, to make his return. Then it seems the commissioner refused to go on, and the solicitor of the creditor applied here to the Judge at Chambers to enlarge the time for the return of the commission, which was refused. Subsequent applications to avail himself of the examination of witnesses at Toronto under the commission also failed, and as the time now fixed for the trial is July 14th, it was pointed out to Mr. Justice Longley on an *ex parte* application that unless an examiner was appointed to take examination of witnesses in Toronto the creditor would be excluded here practically without a hearing, as witnesses could not reasonably be brought from Toronto here to prove a \$250 claim. The Judge, no doubt viewing the whole situation, thought it a proper case for the exercise of his discretion to act *ex parte* in committing an examination to a master or examiner at Toronto.

The learned Judge not being at home, I am asked to set aside his order. I am naturally loth to do so, even if I have under the circumstances the power. In the interest of justice the obvious thing to do is to let the creditor

be heard before an examiner in Toronto, and the hearing then proceed here after the evidence comes to hand. The liquidator is an officer of this Court in the winding up, and represents every person interested. He has full right to contest claims, but would have obviously no desire to shut out a creditor without a hearing, and he cannot reasonably expect a Toronto creditor asserting a small claim to bring his witnesses here. In view of the large powers of the Court under the Winding-up Act, as well as under our Judicature Act, in the commitment of special matters to examiners, I am not clear that the learned Judge acts without authority and I would not attempt to interfere with his discretion in the granting of the order *ex parte*.

To set this order aside would, it seems, directly tend to prevent a hearing in a matter in which, in my view, the creditor has a clear right to be heard, and any doubt I have about the regularity of the proceedings, I think should be exercised so as not to defeat the hearing of the creditor in the manner proposed by the order of Mr. Justice Longley.

I must refuse the application to rescind Mr. Justice Longley's order.

W. F. O'Connor, in support of application.

F. L. Davison, contra.

NOVA SCOTIA.

SUPREME COURT.

JUNE 9TH, 1908.

RE BANK OF LIVERPOOL.

Debtor and Creditor—Judgment—Application to Sell Lands under Execution—Release of other Lands—Effect of—Equities—Registry Act.

RUSSELL, J. (at Chambers):—This is an application by J. T. W. Meagher, assignee of a judgment against the late Rev. T. A. Higgins, for leave to issue execution against certain land now held subject to the judgment by A. DeW. Barss, having been conveyed to him by the executors of the judgment debtor. It is claimed on behalf of Mr. Barss that but for the fact that the judgment creditor released other properties from the effect of the judgment he would have had either the right to have the judgment collected *pro rata* from all the properties bound by it at

the time it was recorded, or to have the whole amount of the judgment made out of the other lands on the ground that they were those last conveyed, the intermediate conveyances and devise respectively under which they passed having been voluntary and not to be taken into consideration in fixing the time of conveyance, and that the judgment creditor having released the other lands and prevented contribution or the proper incidence of the burden, he cannot now obtain leave to issue the execution against the remaining lands. These are nice questions and probably difficult ones, which I have stated more obscurely than I should feel at liberty to do if I proposed discussing them. Their precise nature can be gathered from the briefs which I shall file.

I think that under the provisions of the Registry Act the recording of the judgment gives it the effect of a mortgage, and that the judgment creditor can release whatever part of his security he sees fit to release upon whatever consideration he chooses. If the party holding the land has any equities they are not equities against the creditor, and leave granted to sell the land under the executions as prayed for will not affect those equities.

If the conveyances of the other lands were voluntary he may have a right to transfer the whole burden of the charge to those lands, or whether voluntary or otherwise he may have a right to contribution from the grantees of those lands. But all this does not seem to me to affect the rights of the judgment creditor, who until he received payment has recourse against all the securities available to him.

W. F. O'Connor and H. P. Savary, in support of application.

W. F. Roscoe, K.C., contra.

QUEBEC.

COURT OF REVIEW.

JULY 1ST, 1908.

VENNAT v. SHIP.

Coram, TELLIER, PAGNUELO, and HUTCHINSON, JJ.

Landlord and Tenant—Lease—Disrepair of Premises—Defective Heating—Right to Cancel Lease.

In review of the judgment of the Superior Court, Montreal, Martineau, J., rendered the 30th January, 1907. The

action was one to resiliate a lease, plaintiff claiming that the premises were uninhabitable since it was impossible to keep them warm enough owing to defective construction. The defendant pleaded that he sent a man to try and remedy the defects complained of by the plaintiff respecting the heating apparatus, but the plaintiff refused to allow his workmen in. The Superior Court decided in favour of the plaintiff and resiliated the lease with costs.

HUTCHINSON, J.:—The majority of this court is of opinion to confirm the judgment. The proof establishes that the store was not sufficiently heated, and that the plaintiff could not carry on his business on account of the condition in which it was. On the 20th November, 1906, plaintiff sent a letter to defendant complaining at that time that the store was insufficiently heated, and asked the defendant to attend to it, and subsequently verbal requests were made to defendant and his son-in-law to the same effect. Then on December 13th, 1906, plaintiff wrote again to the defendant complaining of the want of heat in the store and notifying defendant that he would not pay him any more rent until the store was sufficiently heated. The next day, 14th December, the plaintiff wrote again to the defendant and threatened immediate action if the necessary repairs were not made. On the 18th December defendant sent a man to the plaintiff's store, but plaintiff himself being absent, his clerk told him to come back in a short time when the plaintiff would be present. The defendant did come back in the course of an hour and was told by the plaintiff that he had no consent to give him as the matter was in the hands of his lawyers, and that he would get his answer from them. The writ of summons was issued on the same day, the 18th December, and the action was served on the 21st. On the 19th December the defendant served plaintiff with a protest demanding admission to the premises in question in order that he might ascertain what repairs, if any, were necessary.

The defendant, while admitting that the premises in question were not sufficiently heated, yet contended that plaintiff's action can only be to compel defendant to make the necessary repairs or to obtain authority to make them himself at defendant's expense, and that the plaintiff had not the legal right to obtain a judgment resiliating the lease in case such repairs were not made; that the said repairs

could have been made in the course of 12 or 13 hours, and that defendant was at all times willing to make the repairs if they were necessary, and, consequently, that defendant was never put in default to make the said repairs.

From the letters filed, sent by plaintiff to defendant, namely, on the 20th November, the 13th and 14th December, and the further evidence adduced, it is evident that the defendant was put in default to make the repairs required to sufficiently heat the said building; that the defendant, neither in his protest of the 19th December nor in his plea expressed any willingness whatever to make the said repairs which he evidently knew were necessary in order to sufficiently heat the said store, and as the plaintiff, by his action, has declared his option (not "taken his action," as declared in defendant's factum) to obtain a resiliation of the lease in default of such repairs being made, there does not seem to be any ground to refuse plaintiff what he has demanded by his action, namely, the resiliation of the lease.

The judgment of the Court below has resiliated the lease and the majority of this Court is of the opinion that this judgment is well founded and we confirm it, with costs in both Courts.

PAGNUELO, J. (dissentiente):—People living in a house heated to 58 degrees claim that sufficient reason to have a lease cancelled. Such a temperature is recommended by the doctors. It is disagreeable to always have such a temperature, but it is not such a low temperature as to justify the resiliation of a lease. On the 22nd November, 1907, plaintiff sent defendant a lawyer's letter complaining of the cold, and on the 14th December he wrote again threatening to quit the premises. So that for one month the premises were not uninhabitable since the plaintiff was able to live in them. The defendant's plumber found that plaintiff did not know how to manage the heating apparatus. That was all. The plaintiff had merely a right to have the defendant forced to do whatever repairs were necessary. He had no action to break the lease. The action should have been dismissed.

QUEBEC.

COURT OF REVIEW.

JULY 1ST, 1908.

DESORMEAUX v. GRATTON.

Coram, TELLIER, PAGNUELO and HUTCHISON, JJ.*Landlord and Tenant—Lease—Resiliation—Unsanitary Conditions.*

In review from the judgment of the Superior Court, CURRAN, J., rendered the 18th December, 1907. Plaintiff sued for the resiliation of a lease, claiming \$155.10 damages by reason of illness and other inconveniences suffered by the alleged dampness of the house he had rented from the defendant. The Superior Court found that the bad state of the house justified the plaintiff in leaving it, and in asking for the resiliation of the lease. Lease resiliated, damages assessed at \$25, with costs.

TELLIER, J..—The majority of this Court is of the opinion to confirm the judgment. Two doctors, including the medical health officer, reported that the house was unfit to live in by reason of the damp. A big kitchen stove had been kept going from the 1st May to the 22nd June, but without much effect. Plaintiff's wife had contracted rheumatics from the state of the house. The house was only completed in April and the cold and damp had thoroughly penetrated it. The house had been well ventilated, but it was no use. The clothing of the plaintiff's family was injured by the damp. Judgment confirmed, with costs.

PAGNUELO, J. (dissentiente):—It was only on the 22nd June that the proprietor was protested. The plaintiff and his family only quit the house on that day, and yet the plaintiff says that the dampness had existed since the 1st May. As soon as notified the defendant called upon several experienced contractors to examine the house. They reported that it was healthy. Setting aside this evidence of men of experience, the first Court accepted the evidence of two doctors and a nurse as to the condition of the house. The plaintiff had,

at the best, an action to force the defendant to make the house habitable. He had no right to quit the premises. I dissent from the judgment.

QUEBEC.

COURT OF REVIEW.

JUNE 27TH, 1908.

THE MONTREAL WATER & POWER CO. v. THE
SCHOOL COMMISSIONERS OF ST. HENRI.

Coram, TELLIER, PAGNUELO, and HUTCHINSON, JJ.

Contract—Water Supply—Rate—School Building—Municipal Law.

In review of the judgment of the Superior Court, Montreal, LAFONTAINE, J., rendered the 2nd day of March, 1907. The plaintiff sued to recover \$2,417.14 for water supplied to certain colleges and schools under the control of the defendants in the heretofore city of St. Henri, now part of the city of Montreal. The case involves the interpretation of the contract between the parties. The Superior Court dismissed the action, with costs.

PAGNUELO, J.:—The dispute between the parties is as to the proper interpretation of the contract between the parties in regard to three questions:—(1) As to the proper manner of establishing the rental value of school properties for the purpose of basing the water rate thereon; that is, as to whether this rate shall be based on a 4 per cent. or 6 per cent. of the value of the defendants' properties; (2) As to whether the property on which this assessed annual value is to be taken includes all the land used for school purposes, such as playgrounds, etc., or only the school buildings and the land on which they are erected; (3) As to the proper rate to be paid for urinals in use in defendants' school buildings.

By article 9 of this contract it is provided that "the water rate to be charged by the plaintiff will only be 75 per cent. of the price mentioned in schedule 'B.' annexed to the contract, with the exception of the price for horses

and cows, for which a separate price was charged." But this schedule "B," annexed to the contract, while providing the rate for dwelling houses, shops, hotels, etc., makes no provision whatever for colleges and schools. But it is subsequently provided, in said article 9 of the contract, that the rental valuation according to which the water tariff shall be imposed will be for tenants, the amount of rent actually paid by them, and for proprietors, a rental estimated at 6 per cent. on the value of their property when occupied by themselves, as declared in the valuation roll then in force.

The plaintiff's contention is that as schedule "B" makes no provision for schools and colleges, that this clause in the contract should govern, and that as the defendants are the proprietors of the colleges and schools in question, and occupied by them, that the basis of the rate should be 6 per cent. of the valuation of these properties as fixed by the valuation roll of the town.

Previous to the date of the contract in question, there was a contract and a by-law, No. 58, and a schedule "A" for the basis on which to estimate the rate.

In by-law 62 and the contract in question we have the following:—"The water tariff adopted by the present by-law, as being the one which shall be in force, shall, from now until the 1st May, 1892, be the tariff actually in force as shewn by the schedule 'A,' hereto annexed, and, counting from the 1st May, 1892, it shall be the tariff that appears in the schedule 'B,' heretofore annexed, that is to say, 25 per cent. less than the tariff actually in force for the city of Montreal, except for horses and cows, for which the tariff will be for one horse, 75 cents, and for each cow, 50 cents."

Now as schedule "B" is silent as to the rate to be charged for colleges and schools, it is important to know what was the tariff in force in Montreal in regard to colleges and schools. Upon investigation, it is learned that these institutions are taxed at a rate of 4 per cent. on the actual value of the property in each case; the said value is established by the valuation roll last made and revised. It is true the by-law adds, "That is to say, 25 per cent. less than the tariff in Montreal," but this does not appear in the contract between the parties, and the contention of the plaintiff that it is bound by the contract only and not by the by-law cannot be maintained. The first clause of the

contract says that the mayor and secretary of the town of St. Henri are authorized to make the contract in virtue of the by-law, and it is evident that the mayor and secretary can neither give more nor take less than what was provided in the by-law, and this to the knowledge of the defendants. The by-law is specially mentioned in the contract, and, finally, in article 27 it is provided: "That the provisions of this contract shall be interpreted and construed in accordance with the terms of the said by-law, and the interpretative provisions of said by-law shall be construed as part hereof, and with the terms of the said contract of the 30th January last passed, which said contract shall not be abrogated except so far as the provisions thereof may be inconsistent with or contradictory of the present contract, and the said contract and by-laws shall be read and construed together so as to give the fullest effect to each and every one of them."

Schedule "A," based upon by-law No. 58, only provided for a basis of 4 per cent.

From the present contract, it will be gathered it was intended to charge the defendants a lower, not a higher, rate, and if the percentage was fixed at 6 per cent., the defendants would be paying a higher rate than before. The plaintiff's claim for a basis of 6 per cent. is not well founded. The defendant's contention for 4 per cent. is the correct one.

On the second question, article 9 of the contract in question contains the following: "And these charges for water shall be payable by the occupant or tenant, or the occupants or tenants, of the building, or portion of the building, thus supplied with water, in the municipality." From this it will be seen that it is the occupants or tenants of the building supplied with water that are obliged to pay the water rates, and not the occupant and tenants of the land adjoining these buildings that might be used by the occupants or tenants of those buildings. Further, should any one wish to water a garden or other piece of ground in the immediate vicinity of those buildings, there is a special charge authorized for the use of the hose which would practically be the only means of watering the adjoining ground.

We must, therefore, conclude on this point, that charges for water must be restricted to buildings and to the land upon which they are erected.

As to the third question, the Court below upheld the plaintiff's pretension on this point, allowing it the full amount demanded, viz., \$15 per urinal. The reason given by the Court for not granting the whole claim under this head is that the plaintiff, during the preceding five years, rendered accounts to the defendants from time to time, and only claimed \$3 for each urinal, while the present action is taken for the recovery of \$15 for each urinal, and the plaintiff does not allege error or any other reason for so doing. Under these circumstances it is difficult to see that the plaintiff has ground for complaint in regard to this part of the judgment.

The plaintiff, however, complains of the manner in which the costs have been awarded. The amount tendered the plaintiff is \$284.38, and the judgment of the Court in the first instance has awarded the plaintiff the sum of \$554.38, but has obliged each party to pay its own costs.

The defendant, however, succeeded on two of the three grounds in issue, and therefore the trial judge divided the costs, exercising the discretion given him by law.

For the reasons above given, this Court is unanimous in confirming the judgment of the first Court, with costs.

QUEBEC.

COURT OF REVIEW.

JUNE 27TH, 1908.

POISSON v. THE SHERBROOKE STREET RAILWAY
CO.

Coram, TELLIER, PAGNUELO and CURRAN, JJ.

*Street Railway—Accident to Pedestrian—Undue Speed of
Car—Negligence—Damages.*

In review of the judgment of the Superior Court, St. Francis, HUTCHINSON, J., rendered the 11th day of November, 1907. Plaintiff claimed \$5,000 from the present defendant, inscribing in Review, and the corporation of the town of Lennoxville, by reason of the death of her husband, who was struck by a car of the defendant company on the road between Sherbrooke and Lennoxville, the plaintiff

alleging the bad condition of the road and the immoderate speed of the car. The Superior Court condemned each of the defendants to pay \$500 damages. The corporation of Lennoxville has acquiesced in the judgment, and paid the amount of its condemnation.

CURRAN, J.:—The evidence of the motorman and conductor of the car shews that they were both in the front compartment of the car, which is reserved for the motorman, and the latter remarked to the conductor, when the deceased was first seen walking on the highway alongside of his load of wood, and coming towards the car, that "the man was a little near the track," and that was the reason he rang the bell to attract his attention, and put on the brakes. The motorman admits the car was going down hill at five miles an hour; a witness for the plaintiff says the speed was ten miles. The opinion of this Court is that, under the circumstances, the car should have been stopped altogether instead of approaching at a rate of five or six miles an hour—as defendant admits—on a down hill track in winter. The motorman was guilty of gross negligence. We unanimously confirm the judgment, with costs in both Courts.

NEW BRUNSWICK

FULL COURT.

APRIL 25TH, 1908.

EX PARTE KIERSTEAD, IN RE ROBERTSON.

Solicitor and Client—Moneys in Solicitor's Hands for Specific Purpose—Agreement to Apply same to Solicitor's Costs.

In Hilary Term last, on application of I. T. Kierstead, a rule nisi was granted calling upon H. W. Robertson, an attorney of this Court, to show cause why he should not pay over to Kierstead a sum of money which had been deposited with Robertson, as his attorney, to settle a claim of a third party against Kierstead.

H. A. Powell, K.C., now showed cause and read affidavits to show that a new arrangement had been made by which Robertson was to retain this money for his costs, and con-

tended that there being a bona fide dispute of facts the Court would not deal with the matter on a summary application, and cited *Hodson v. Terrall*, 2 Dowl. Prac. Rep. 264.

D. Mullin, K.C., in support of the rule, read affidavits in reply, and claimed that the matter was such that the Court could decide it on this application, and cited *Re Cullen*, 27 Beav. 51.

And the Court delivered judgments as follows:—

BARKER, C.J.:—It is quite clear from what has been disclosed by the affidavits produced and read that there is a bona fide dispute as to the facts upon which the right of the attorney to retain the money in question is dependent, and is therefore a question upon which the parties are entitled to have the finding of a jury, and should not be disposed of on a summary application. The application must be dismissed—and with costs—as all the facts were within the knowledge of the applicant when he applied for the rule.

HANINGTON, J.:—I agree with the Chief Justice that there is a bona fide dispute as to facts and the application should be refused. If I had to decide the facts on the affidavits produced and read to us, I would have no hesitation in refusing the application on the merits. Mr. Robertson has satisfied me that he acted very properly and as any honourable attorney should act under the circumstances, and he is entitled to retain the money which we are asked to order him to pay over.

LANDRY, J.:—I agree with the Chief Justice that the application should be refused on the ground that there is a bona fide dispute as to the facts. As to which party states the facts correctly, I am not prepared to express an opinion, and it is not necessary that I should do so, but there are many circumstances that would incline me to look favourably upon the applicant's version.

MCLEOD, GREGORY, and WHITE, JJ., agreed with the Chief Justice.

Rule nisi discharged with costs.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 7TH, 1908.

SLEETH ET AL. v. CITY OF ST. JOHN.

GORDON v. CITY OF ST. JOHN.

Expropriation of Land—Assessment of Damages—63 Vict. (N.B.) c. 59—Piling as “Buildings and Erections”—New Trial.

These two cases were argued together in Michaelmas Term last. Motion was made under s.-s. (c) of s. 2 of 63 Vict. c. 59 (Acts of Assembly, 1900), on the part of the plaintiffs for a new trial from an assessment of damages made by Mr. Justice McLeod under the said Act of Assembly or an expropriation by the City of Saint John of certain lots of land in the possession of John Sleeth and Robert Quinlan, and a lot in the possession of John F. Gordon as lessors of the city, on the ground that His Honour was in error in refusing to assess to the plaintiffs the value of piling fastened together with stringers and driven in the ordinary way on the demised premises, and of filling in of same to make it available as a site for buildings.

Hon. H. A. McKeown, Atty.-Gen., for plaintiffs.

C. N. Skinner, K.C., for defendant.

MCLEOD, J. (dissenting):—In these cases I am obliged to differ from my learned brethren on the bench. The facts of the cases are practically as follows:—In 1877, the city of Saint John gave a lease to a company known as the Red Granite Company, of ten lots of land situate in that part of the city of Saint John known as Carleton. The lease was for twenty-one years, from the first of May, 1877, and would have expired on the first of May, 1898. The lots extended along Union street 200 feet; that is from Charlotte street to Ludlow street and back between Tower and Charlotte streets 250 feet, taking in the whole ten lots and making a block 200 by 250 feet. When they were let Charlotte Street (which extended up one side of them), or Tower street (which extended on the other side), had not been filled up; neither

had Union street. but the company covenanted to build it up along the whole front of the lots. The ten lots, when leased by the city, were part of what was known as the Mill Pond, that is, the tide flowed over them, and at high tide they were from ten to twelve feet under water, and were unfit to be built on, except by filling them in and raising them up to the level of the adjoining land and above the tide. The lease contained a covenant that at its expiry the city could either renew it for a term of seven years or pay for the buildings or erections thereon.

The Red Granite Company went into possession under the lease and proceeded to prepare the lots for being built upon. To do this a Mr. Mayes was employed, who drove piles along the two hundred feet on Union street, and back about one hundred feet. The piles were driven over this whole section and were about ten feet apart. Some other person was engaged who continued the driving of piles for fifty feet or more further back and across the whole block from Tower street to Charlotte street and about the same distance apart. The company then erected a building on a part of these piles for the purposes of their business, which was the preparing and polishing of granite for monuments, etc. The building had to carry a very heavy weight and required to be strong and substantial, not only because of the heavy blocks of granite that were to be taken into it, but also because of the heavy machinery that was to be used in it for the sawing of the blocks of granite. The building was one hundred and fifty feet long and extended along Charlotte street to within two or three feet of Union street. The company also erected a small office near Union street. The company immediately commenced filling the lots in with earth and gravel; some ballast from ships was used and also broken pieces of granite, and within six or seven years the lots were practically filled in up to the top of the piles, so that it became solid ground: that part along Union street for more than thirty feet back was undoubtedly filled up to the top of the piling and was solid ground. The rent reserved in the lease was \$17.50 a lot, or \$175 in all; but the company, in 1886, asked that the rent be reduced, and on its application it was reduced to \$7.50 a lot, or \$75 in all. In 1892 the company sold out to John Sleeth, Robert Quinlan, Thos. W. Atherton and Samuel Fox. It does not appear at what time in the year the sale was made, what was paid or what the terms of the

contract were. One of the witnesses said the contract he thought was in writing, but it was not put in evidence. No assignment of the lease was made, although there was no covenant in the lease to prevent an assignment of it by the company. In the subsequent lease there was such a covenant.

In October, however, of that year (1892), the company applied to the city for leave to surrender its lease and asked for payment of its improvements. The application was not put in evidence, but the city council by resolution declined to pay for the improvements, but agreed to accept a surrender of the lease on the company paying rent until the first day of November then next. The company accepted this and surrendered the lease on the 1st of November, 1892. The surrender, after reciting a part of the lease, is as follows: "The New Brunswick Red Granite Company have granted, surrendered, and yielded up and by these presents do grant, surrender, and yield up to the lessor the said, the city of Saint John, the lots of land described in the above in part recited indenture of lease with all buildings and improvements thereon," etc. By this surrender, therefore, the property again vested in the city.

In December of that year (1892) a new lease was granted to John Sleeth, Robert Quinlan, Thomas W. Atherton and Samuel Fox, of the same lots for the same rent and containing a similar covenant for renewal or payment for buildings or erections. This lease was for seven years from the 1st of November, 1892, and would expire the 1st of November, 1899. Atherton and Fox subsequently assigned their rights in the lease to Sleeth and Quinlan, and about two years before it expired Gordon purchased a portion of the leasehold of these lots from Sleeth and Quinlan.

I should say in the first place that four of these lots, being each fifty feet wide and running back one hundred feet, were bounded on Union street. Three of them, being each fifty feet wide, were bounded on Tower street and ran back one hundred feet, and were directly in the rear of these last mentioned lots. The three others were, each fifty feet wide, bounded on Charlotte street, and ran back one hundred feet in the rear of the lots bounded on Union street. The ten lots thus made a block 200 feet on Union street and 250 feet on Charlotte and Tower streets. The questions involved in this case only affect the four lots that were bounded on

Union street. One of these lots was leased to Gordon and was bounded fifty feet on Union street and ran back on Tower street one hundred feet; the other three lots being each fifty feet in width, were bounded on Union street and ran back one hundred feet, and were leased to Sleeth and Quinlan.

This lease made in December, 1892, was surrendered one or two years prior to the time it would expire, but Gordon and Sleeth and Quinlan continued in occupation and paid the rent. In 1902 the city granted new leases for these lots, one to Gordon of a certain number of the lots, and one to Sleeth and Quinlan of the balance. In Gordon's lease was included the lot I have spoken of as being bounded on Union and Tower streets; in Sleeth and Quinlan's lease were the other three lots on Union street. The lease to Sleeth and Quinlan was dated in March, 1903, and that to Gordon in February, 1904, and each was for seven years from the 1st of November, 1899, with the same rent of \$7.50 for each lot. Each lease contained a covenant, as in the former lease, which (in the Sleeth and Quinlan lease) is as follows:—
“And it is hereby mutually covenanted and agreed by between the parties to these presents, that in case the said John Sleeth and Robert Quinlan, their executors, administrators, or assigns, shall erect and put up any buildings or erections for manufacturing purposes, as hereinafter mentioned, upon the said hereby demised premises, within and during the said term of seven years, at the end and expiration of the said term, the same with any such now thereon, if then being thereon, shall be valued and appraised by two indifferent persons, one to be chosen by and on the part of the said city of Saint John, their successors or assigns, the other by or on the part of the said John Sleeth and Robert Quinlan, their executors, administrators, or assigns, and which two persons in case of disagreement, shall choose a third, the determination or appraisement of any two of whom shall be final and conclusive; and it shall then be at the option and election of the said city of Saint John, their successors and assigns, to pay to the said John Sleeth and Robert Quinlan, their executors, administrators or assigns, such appraised value of such buildings or erections as aforesaid or to extend and continue the lease and demise of the said lots and premises unto the said John Sleeth and Robert Quinlan, their executors, administrators, or assigns, for a further term not less than seven years, at the same yearly rent, payable in like manner

and under the like covenants, conditions, and agreements, as are expressed and contained in these presents; and so, as often as such case shall happen, at the end or expiration of any lease or demise of the said premises for any further term or terms, there shall be a like valuation and the like option as hereinbefore mentioned."

About a week before these last leases expired, that is, about the 26th October, the city of Saint John, for public purposes, expropriated thirty feet from the lots fronting on Union street, that is, from the three lots leased to Sleeth and Quinlan and the one lot leased to Gordon. When the leases expired—November 1st, 1906—the city refused to renew them and arbitrators were appointed by the city and also by Gordon and Sleeth and Quinlan to value the buildings or erections on the property, under the covenant; and the arbitrators made a valuation of these buildings or erections on all the lots, save and except the buildings or erections on the 30-foot strip that had been expropriated. The parties then came before me, under 63 Vict. c. 59, N. B. Statutes, to have the buildings or erections that were on this 30-foot strip valued. The only buildings in it were the office and about 26 feet of the building 150 feet long that was erected along Charlotte street. When this 30-foot strip was expropriated, the portion of that building that was on it was cut off; the rest of the building remained standing on the balance of the lot and was valued by the arbitrators.

Although the claims of Gordon and Sleeth and Quinlan were separate (that is, Gordon claimed damages for what was done his lot, and Sleeth and Quinlan claimed damages for their three lots), still as the matter on every other principle was the same the cases were heard together.

The parties claimed before me that they were entitled, in the first place, to be allowed for all piling and filling in that was done for the purpose of making these lots fit to build on, claiming that this was a part of the buildings or erections provided for in the covenant. Secondly, they claimed for the actual buildings or erections that were on the lots, that is for the office and the portion of the 150-ft. building that extended over on the 30-ft. strip. These buildings were both on lots that were leased to Sleeth and Quinlan; there were no buildings or erections whatever on the 30-ft. strip that was taken from the Gordon lot. Thirdly, they claimed damages for the interference with their business, by taking possession of

this 30-ft. strip before the lease was due. The city, on its part, claimed that the parties were only entitled for the buildings or erections that were on the lots, and were not entitled to be paid for the piling and filling in, claiming that that was not a building or erection. The city admitted that the parties were entitled to be paid such reasonable damages as they might have suffered from this portion of their property being taken possession of, prior to the expiry of the lease.

After hearing the evidence and the argument of all the parties and considering the matter carefully, I concluded that under the covenant in the lease the parties could only recover for the buildings or erections that were on the land, and for any damages they suffered in consequence of the city taking possession of this portion of the property before the leases had expired; and I awarded Sleeth and Quinlan as their damages fifteen hundred dollars. On Gordon's lot there were no buildings or erections, but I awarded him three hundred dollars for damages sustained from possession of the land being taken before the expiry of the lease. It is admitted that if I have proceeded on a correct principle the damages I so awarded are sufficient; but it is contended that I should have allowed for piling and filling in the lots and making them fit to build on, as a part of buildings or erections.

The parties, as they had a right, appealed from my decision, and the question now to be determined is: Should I have valued the piling that was driven for the purpose of making these lots fit for building on, and also the filling in?

Before these leases were given, the whole of these ten lots was practically filled up to the top of the piles, or at all events very nearly all of them. So far as the 30-ft. strip is concerned, it was undoubtedly filled up to the top of the piles and over the piles, and was solid ground at the time the present leases were given. Indeed they were so piled and filled in before the lease was given in 1892, and the evidence does not shew that these parties did any piling or filling in.

The plaintiffs claimed that, although they did not do that work, it was done by the Red Granite Company, and under their covenant they are entitled to claim for it. I think differently. First, I do not think that the plaintiffs can claim for anything under the covenant contained in the lease to the Red Granite Company. Their lease is not a

renewal, and does not profess to be a renewal, of that lease. And the fact that the covenant in their leases is in the same words as the covenant in the lease to the Red Granite Company, does not entitle them to claim for the improvements made by that company by piling and filling in and fitting the lots to be built on. If, after the company had surrendered its lease and improvements to the city, the lots had remained vacant for some years and then the city had granted a lease of them, containing a covenant in these same words, it would scarcely even have been contended that the words in the covenant: "In case the said John J. Gordon, his executors, administrators or assigns shall erect and put up any buildings or erections for manufacturing purpose, as hereinafter mentioned upon the said demised premises, within the said term of seven years, at the end and expiration of the said term, the same with any such now thereon if then being thereon, shall be valued," etc., the lessee would have the right to have assessed as damages this ten or twelve feet of piling and filling that had been done years before in order to raise the land above the water, and fit it for the purpose of receiving buildings or erections. I do not think the present leases, or the lease given in 1892, can be considered to be a renewal of the lease given to the Red Granite Company, and the covenant now being considered must be construed as though neither of these leases was a renewal of the lease to the Red Granite Company. Although it is said that Messrs. Sleeth and Quinlan and their associates purchased from that company, it is clear they did not purchase the buildings or erections on the leasehold property, because the company proposed to move them to St. George for its works there, and I think did take some, but it certainly removed some of them off the lots for the purpose of taking them to St. George, but finding that it would not pay them to take them there, left them, and the lessees moved them back on to the lots.

But if I am wrong in this contention under the terms of the covenant in these leases, the parties cannot claim for the piling or the filling in of the land and making it fit for buildings or erections. The covenant must be construed according to the ordinary meaning given to the words in it. The parties have agreed, that on the expiry of the lease they are to be paid for buildings or erections on the land. To give the words the construction contended for they must be read as though the parties had said "improvements, build-

ings or erections on the land." These words would cover the improvements made by building up the land by piling and filling in, in order to make it fit to receive buildings or erections, and which would be an improvement. The covenant, however, is simply a contract between the parties, and must be construed according to the words used by the parties, and "buildings or erections" have a well known meaning, and cannot be properly construed to include the building up of the land by driving piles and filling in, so as to bring it up above the water level so that buildings or erections may be put on it. A fair way to look at the lease with reference to the construction is to test it in the light of the following supposed facts: Suppose the city of St. John after giving these leases had sold the land—would the purchaser when he looked at the leases and saw that at the expiry he was either to renew them or pay for buildings or erections on the land—suppose that he was under that covenant to pay for some ten or twelve feet of ground below the buildings? When the lease to the Red Granite Company was made, it was known to both the lessor and lessee that the lots in their then condition could not be built upon. No buildings or erections could have been put upon them. It was necessary to raise the same above the level of the water in order to make it fit to put the buildings and erections upon it. If it was intended that the lessee should be paid for this work—that is the improvements that had to be made for the purpose of placing the buildings or erections on the land—apt words would have been used. There is an important difference between paying for the "buildings or erections on the land" (the words used in the lease), and paying for the improvements that it was necessary to make upon the land in order to fit it to put buildings or erections upon.

These cases are very similar to a case arising in Ontario, —*Adamson v. Rogers*, 22 Ont. App. Cas. 415. That was a case of a sub-lessee claiming against the original lessee. The lease, under which the claim was made, had the following covenant: "Provided, also, that instead of granting such other lease, it shall and may be lawful, for the said party of the first part, his heirs and assigns, at the expiration of the term hereby granted, to take the buildings and erections that shall or may be then on the said demised premises, at such price and sum as shall be fixed or determined by three persons to be chosen in the same manner as above provided

for, for the purpose of determining the increased ground rent of the said demised premises." There were some other covenants in the lease that it is not necessary for me to refer to, because the case turned on what was the construction to be given the covenant copied. The land demised was land covered with water, and it was necessary to fill it in and build it up, to fit it to put buildings and erections on, and the lessee did this by driving piles around it and filling it all in with earth, up to the level of the adjoining lands. I do not think that any buildings had in fact been erected on it, but it was so raised for the purpose of putting buildings on it. The lessee claimed, however, that under his covenant he was entitled to be paid for this filling in and piling under the terms of the lease, claiming that that was a building or erection. The case in the first instance came before McDougall, Co.J., who held that the plaintiff could not recover as for buildings and erections. It then went to the Divisional Court, and that Court—consisting of Boyd, C., and Ferguson, J.—reversed that decision, holding that the filling in was an erection; and it is noticeable that Boyd, C., in giving judgment, makes the same contentions that are made by the plaintiffs. He says as follows: "The filling in of earth, etc., was the 'erection' of a foundation whereon to build a house, and such foundation is as much a part of the building as a cellar would be which is formed by excavation in an ordinary dwelling house.. 'Erection' is a more comprehensive term than 'building.'"

An appeal was then taken to the Ontario Court of Appeals, and that Court reversed the judgment of the Divisional Court, and restored the judgment of McDougall, J., holding that the expression "buildings and erections" did not include the filling in of the land to make it fit for the purpose of building.

Burton, J., in his judgment says (at page 424), as follows:—"If it really was the intention of the parties to the lease upon which this inquiry has arisen, that the filling in of the lot should form the subject of compensation, they have been very unfortunate in the selection of the terms they have used, to express their meaning. If we are, as is said, to look at the position of the parties, when the lease was being executed, and to bear in mind that they were dealing with a lot covered by many feet of water, it furnishes, to my mind, almost convincing evidence that they never contem-

plated including filling in, in the expression 'buildings and erections.' They would convey no idea to the mind of any person dealing with this lease years after its execution, that in taking an assignment of it, he was becoming liable to pay for anything but the visible buildings or erections that might be found upon the demised premises at the expiration of the lease." He further says, "This was compared to the foundation of a building, but that is a very strained construction; the foundation of a building is, no doubt, part of the building, and would be compensated for as part of the building, but the filling in here was merely a preparatory step to make the lot itself suitable for receiving buildings in the same way as any building lot in town might require levelling or filling before erecting a building on it, but I apprehend such a claim as the present has never been preferred in such a case. The fact that extensive filling had to be made would presumably be an element to take into consideration, when fixing the rent, but if intended to be included in the compensation clause I think they have not used apt words to express their meaning, and that the words they have used must be construed according to the strict, plain, common meaning of the words themselves."

MacLennan, J. says (page 427):—"They have not used the general word 'improvements,' but words which ordinarily have a well known and well understood but limited meaning, and I find it quite impossible to believe that these business men meant or intended that the tenant should be paid for earth filling or cribbing or piling, in connection with such earth filling. I think that if that had been intended, they would have said so, and not left it at all doubtful that such was their meaning." This judgment of the Ontario appellate court was sustained by the Supreme Court of Canada (26 S. C. R. 159).

This language, used both by Burton, J., and MacLennan, J., seems to me to apply with great force to the present case. In my opinion, the damages have been awarded on a proper principle. The words "buildings or erections" have a clear meaning, and convey to the mind that they are structures placed on the land, and in giving them their ordinary meaning will not convey to the mind that they include the building up of this land some ten or twelve feet by driving piles and filling it so as to bring it above the water level, and to the height of the adjoining land, in order that the buildings

or erections might be placed on it; at all events, if the parties intended that this was to be paid for, they should, and I think would have, used other words as "improvements" or words clearly shewing their intention that it was to be paid for.

It is claimed that the piling and filling in was the foundation of the building, and therefore is a part of the buildings or erections provided for in the covenant, but, as was said by Burton, J., this is a very strained construction. In a sense it may be called the foundations, but only in the same sense as the ground on which any building is placed may be said to be its foundation. But it is not the ordinary way in which the word is used when it is treated as a part of the building. The walls that are placed under the building are what is spoken of as the foundation when it is taken as a part of the building. What is here spoken of as the foundation is simply the land that was built up for the purpose of placing the building thereon. A large part of this 30-ft. strip is not covered by buildings. On the Gordon portion there are no buildings or erections; on the Sleeth and Quinlan portion there was only the portion of the main building that extended over on to this 30-ft. strip — about 26 feet — and there was also the office, which was about 16 by 26 feet. On the rest there were no buildings or erections whatever, and yet it is contended that they are entitled to claim, under this covenant, for the filling in and piling of this whole strip. I think the covenant cannot be construed to make that work either buildings or erections.

Both appeals in my opinion should be dismissed with costs.

BARKER, C.J.:—Under the provisions of 63 Vic. c. 59 (1900), the city of St. John expropriated a piece of land in the possession of the above appellants as lessees of the city. Application was made under the Act to Mr. Justice McLeod to assess the damages. After hearing a number of witnesses the learned Judge assessed Gordon's damages at \$300, and Sleeth and Quinlan's at \$1,350. Both parties have appealed and the cases come before us under the provisions of sub-sec. C. of sec. 2 of the Act. The cases involve the same point, and they may be disposed of together.

The city of St. John by a lease dated April 2, 1877, demised for a term of 21 years, ten lots of land in Carleton

to the New Brunswick Red Granite Company at an annual rental of \$175. This lease contained a provision by which it was stipulated that in case the Granite Company should erect and put up any buildings or erections for manufacturing purposes upon the demised premises during the term, they should be valued and appraised at the end of the term by valuers as therein directed, and that it should then be at the option and election of the city to pay the company this appraised value or to extend the lease for a further term of seven years at the same rent and upon the same conditions. The Red Granite Company carried on the business of manufacturing monuments and other stone work from red granite, and for the purpose of their business they erected the necessary buildings on a portion of these lots, and continued carrying on their business there until the year 1892, when they removed their works to another part of the Province. They took with them a portion of their plant, but the remainder, together with their interest in these leasehold lots, they sold to the appellants Sleeth and Quinlan and two others (Allan and Fox), who were then also interested in the business. Subsequently Sleeth and Quinlan acquired the interests of Allan and Fox in the premises; and later on an arrangement was made by them and the appellant Gordon for a division of the lots between them, Gordon being anxious for a site for a nail factory. In order to carry out the arrangement, it was agreed between these parties and the city that the then existing lease should be surrendered and new leases issued, one to Sleeth and Quinlan for the lots which they were to have, and the other to Gordon for the lots which he was to have. This was carried out. A lease was executed to Sleeth and Quinlan of lots 989, 990, 991, 992, and a part of lot 988, at an annual rental of \$35, and a lease to Gordon of the remainder of the lots at an annual rental of \$40. Both leases are dated February 24, 1904, and extend for a term of seven years from February 1, 1899, so that they would expire on November 1, 1906. The land expropriated consists of a strip 30 feet wide, including a portion of one of the Gordon lots, on which there were no buildings, and a portion of the Sleeth and Quinlan lots, on which there was a building. This land was expropriated a few days before the lease expired, and it seems to have been understood at that time, or very soon afterwards, that the city had determined not to renew the lease, but to pay for the buildings and erections under the covenant in the lease. At all events, before the evidence in these cases

was given, the improvements on the lots outside of the 30-foot strip expropriated had been valued in pursuance of the covenant in the leases. The only point involved in these appeals is as to the construction placed by the learned Judge upon the following covenant in the leases: "And it is hereby mutually covenanted and agreed by and between the parties to these presents, that in case the said John J. Gordon, his executors, administrators or assigns, shall erect and put up any buildings or erections for manufacturing purposes as hereinafter mentioned, upon the said hereby demised premises within and during the said term of seven years, at the end and expiration of the said term the same with any such now thereon, if there being thereon, shall be valued and appraised by two indifferent persons; one to be chosen by and on the part of the said city of Saint John, their successors or assigns, the other by or on the part of the said John J. Gordon, his executors, administrators or assigns, and which two persons, in case of disagreement, shall choose a third, the determination or appraisal of any two of whom shall be final and conclusive; and it shall be at the option and election of the said city of Saint John, their successors and assigns, to pay to the said John J. Gordon, his executors, administrators or assigns, such appraised value of such buildings or erections as aforesaid, or to extend and continue the lease and demise," etc. The lots in question, in the condition in which they were when the Granite Company leased them in 1877, were mere mud flats, some 12 or 14 feet below the street level. Some means had to be adopted in order to secure a foundation suitable for buildings intended for use in manufacturing stone work. The Granite Company adopted what seems to have been a very usual method in such cases. They had piling driven in the ordinary way, fastened together with stringers sufficiently strong to support the building and flooring, and to carry the weight and resist the vibration incident to the use of machinery and the general operations of a manufacturing business. In addition to this the Granite Company, and those who have succeeded them in the occupation of the property, have been gradually filling up the lots by deposits of refuse, stone and other material, until now they are up to the street level. These appellants claim a considerable sum for the expenditure on account of this piling and filling in, but the learned Judge disallowed that claim altogether, being of opinion that neither was within the

terms of the covenant as being included in the words "buildings or erections." The learned Judge was of opinion that under the special circumstances of this case, and although the claim for damages came out of an expropriation proceeding, the amount of these damages was represented by an allowance for the value of the occupation of the premises for the short period between the date of expropriation and the expiration of the lease, and by the value of the improvements on the premises to the lessee, which was the value of the buildings and erections to be paid for under the covenant, for everything outside of that reverted to the lessor by virtue of the lease itself. No objection has been taken to this view. With the learned Judge's view as to the covenant itself I cannot agree. In addition to the covenant I have already given, these leases contain another by which the lessees bound themselves not to erect, set up or build upon the lots or any of them, any buildings or erections to be used for any other purpose than for manufacturing purposes, or for necessary places or offices for carrying on of the business, and that they should not suffer or permit any building or erection on the land to be used for any other purpose than for manufacturing purposes. We have, therefore, to construe the language and in that way give effect to the intention of two persons who agree that only a manufacturing business shall be carried on on the premises, and that no buildings or erections shall be paid for at the termination of the lease except those built or erected for manufacturing purposes. We have also the fact that they are making this agreement in reference to land upon which they both know no such buildings can possibly be built except by securing a foundation in some such a way as was adopted and of sufficient stability to withstand the strain upon it by the use of the building for manufacturing as the lessor stipulated for. It seems difficult to say that it was the intention of these parties that compensation was to be paid for the buildings and not for the foundation erected for their support, when the erection of a foundation such as was actually built here must have been in the minds of both parties. It may be that this piling is so decayed as to be valueless as a foundation, as I think one of the witnesses has suggested, or it may be that the lots as a result of the filling which has been going on for so many years, have been entirely raised to the street level, and in that way superseded the piling as a foundation, but this would go to the amount

of damages, but would not exclude the question altogether from consideration. I think to the damages assessed to Sleeth and Quinlan should be added such sums as the learned Judge may think was at the time of expropriation the value of the piling on the land expropriated in use or capable or being used as a foundation for buildings. In the Gordon case there was no building erected, but the necessary piling was driven there for the purpose, and if it remained there when the lot was taken, I think its value for that purpose should be allowed. *Adamson v. Rogers*, 26 S. C. R. 159, was relied on by Mr. Skinner as disposing of all questions arising in these appeals favourable to the city. An examination of the facts in that case will shew that it has really very little bearing in the present appeal. That case went to the Supreme Court of Canada on appeal from the Appeal Court of Ontario, and in reference to the report of the case in 22 Ont. Ap. 415, it will be found that there were no buildings or erections on the land at all. In order, however, to convert the lot from a water lot into one of dry land the lessee, with a view of preparing it for a building, filled it in with earth and levelled it off. In doing this he was compelled to build a crib work at the sides of his lot to prevent the earth from spreading on the adjoining property. It had nothing, however, to do with a foundation for the buildings, and was not intended for any such purpose. *Burton, J.A.*, whose opinion was sustained, says: "This was compared to the foundation of a building, but that is a very strained construction; the foundation of a building is, no doubt, part of the building, and would be compensated for as part of the building, but the filling in was merely a preparatory step to make the lot itself suitable for receiving buildings in the same way as any building lot in town might require levelling or filling before erecting or building on it, but I apprehend such a claim as the present has never been preferred in such a case." And *Gwynne, J.*, in delivering the opinion of the Supreme Court, points out that the words "buildings and erections" should have their ordinary meaning, and says that under the facts of that case the covenant to pay for "buildings and erections" on the lot of land ought not to be construed to include the land on which the buildings and erections stand. The compensation was, therefore, refused, the Court holding that the operation of filling the lot was nothing more than an alteration of the level of the lot made with a view to its im-

provement for building purposes. In the present cases, the appellants' counsel did not suggest that the filling in was in any way necessary to support or strengthen the piling as a foundation, or that it was designed to serve any such purpose. Of itself, the mere filling in the lot with earth or other material procured for the purpose, merely for the sake of altering the level of the lot, would not, I think, be included in the word "erection," and it seems to have been so determined in the case I have just cited. There must be a new trial.

HANINGTON and LANDRY, JJ., agreed with BARKER, C.J.

GREGORY, J., took no part.

New trial granted.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 7TH, 1908.

SEERY ET AL., EXECUTRIX, ETC., SEERY v. THE
FEDERAL LIFE ASSURANCE CO. OF CANADA.

*Life Insurance—Non-payment of Premium—Lapse of Policy
—Revival by Subsequent Payment — Warranty of Good
Health—Breach.*

This is an action on a life insurance policy for \$1,000, on the life of Frederick J. Seery, deceased, brought by the executrix and executor of his estate.

This case was argued in Michaelmas term before TUCK, C.J., HANINGTON, LANDRY, BARKER, and GREGORY, JJ. McLEOD, J., took no part, as he is a shareholder in the defendant company.

Before judgment was delivered, TUCK, C.J., had resigned, BARKER, J., had been appointed Chief Justice, and WHITE, J., had been appointed junior puisne Judge.

There were therefore only four Judges to take part, viz., BARKER, C.J., HANINGTON, LANDRY and GREGORY, JJ. Of

these HANINGTON and LANDRY decided against the motion for a nonsuit or new trial. BARKER, C.J., gave a dissenting judgment in favour of a new trial, and GREGORY, J., took no part.

There had been a former trial of this action, when verdict was entered for the plaintiffs, and on motion to this Court a new trial had been granted on the ground that the findings of the jury were incomplete, unsatisfactory and inconsistent. (See 38 N. B. R. 96; 3 E. L. R. 59).

The second trial was had before Mr Justice LANDRY and a jury at the York Sittings in August, 1907, when on answers to questions submitted to the jury, His Honor ordered a verdict to be entered for the plaintiffs.

In Michaelmas Term last, motion was made on behalf of the defendant company for a nonsuit or for a new trial.

M. G. Teed, K.C., and P. J. Hughes, for plaintiffs.

H. A. Powell, K.C., and R. B. Hanson, for defendants.

The following judgments were now delivered:—

BARKER, C.J. (dissenting):—This is the second trial of this case. At the first trial TUCK, C.J., on the answer to several questions submitted to the jury, entered a verdict for the plaintiffs. These answers were, however, found to be so inconsistent and unsatisfactory, that this Court thought it necessary to send the cause down for a new trial, [38 N. B. R. 96, 3 E. L. R. 59]. At the present trial the answers to a similar lot of questions have not been attacked on the ground of inconsistency. In fact they could not be, because, so far as five out of the seven jurors are concerned, they were all answered in favour of the plaintiffs, on all the material questions involved in the case. There is no conflict in the evidence on the point I am about to discuss—the facts detailed by the witnesses are uncontradicted, and there is nothing to suggest that the evidence is not true. The objection to the findings, as to the intemperate habits of the assured, is that as a result of the evidence they are erroneous.

The history of the case stated briefly is this. On the 13th of April, 1901, one Frederick J. Seery, who was then a young man about 39 years of age, unmarried, residing at Fredericton, where he was practising his profession as a doctor of medicine, made an application to the defendant com-

pany for an insurance on his life for the sum of one thousand dollars. The risk was accepted and a policy was issued dated the 3rd of June, 1901, and running from that time. On the 3rd of June, 1902, the renewal premium was not paid, and it remained unpaid for the thirty days grace allowed by the policy. At the expiration of that time—that is on the 3rd of July, 1902—the policy lapsed for non-payment of premium. Subsequently to that Dr. Seery, under the provisions of the policy, made application to be reinstated. He gave the necessary statements as to his then state of health, paid the overdue premium, and the policy was revived on the 8th of August, 1902. He died on the 6th of February, 1903, six months after the policy had been reinstated. He left a will by which he appointed the plaintiffs Josephine Seery, his sister, and Robert W. McLellan, an attorney practising at Fredericton, his executrix and executor. The will was duly proved, letters testamentary were granted to them, they prepared and delivered to the defendant company proofs of the death and claim. Some considerable correspondence took place between the parties; but the defendant company refused to pay on the ground that Dr. Seery's representations as to his health and habits were untrue, and it was, therefore, not liable. The plaintiff, Miss Seery, lived with her brother for some years previous to his death, and, therefore, had a personal knowledge of his habits. The proof of death and claim given to the company was sworn to by both plaintiffs on the 10th of March, 1903, and among other questions in the statement answered by them was the following: "When did the health of deceased first begin to be affected?" Their answer was, "About one year ago." Dr. Crocket, who gave the usual medical certificate in such cases, in answer to the following questions, "Since when had you been medical adviser or attendant? Give date of first attendance, and if for any cause," said, "Nine months, about nine months ago." Dr. Crocket explains the general character of his answer by the fact that he had no books or entries with which to refresh his memory, as in accordance with the etiquette of the profession he was giving his services, such as they were, gratuitously. The cause of Dr. Seery's death is given as "stomach trouble," which I understand to be ulceration of the stomach in some form.

There are two substantial grounds of defence put forward in this case, both of which are based on alleged misre-

presentations by the assured. One is based on his habits and arises out of the representations made in the original application, the other is based on his state of health, and arises out of representations made on obtaining a reinstatement of the policy in August, 1902, I shall deal with these separately. As to the first it is clear I think that the answers to the questions in the original application are warranties, and if they are untrue, the effect is to invalidate the contract and forfeit the paid premiums to the company. This application is expressly made a part of the contract, and as the contract is based on the truth of these answers, no question can arise as to their materiality, the object of the warranty being to obviate all discussion on that point: *Anderson v. Fitzgerald*, 4 H. L. at p. 503; *N. B. & M. Ins. Co. v. McLellan*, 21 S. C. R. 288.

In the application there are the following questions and answers:—

“Q.—What is your daily consumption of wine, spirits or malt liquor.

“A.—No.

“Q.—What has it been in the past.

“A.—Moderately.

“Q.—Have you at any time of your life used them to excess?

“No.”

The policy was therefore obtained on a representation by the assured that he was not then on the 13th of April, 1901, daily consuming any wine, spirits or malt liquors; that in the past he had consumed them moderately; and that he had not at any time in his life used them to excess. The evidence seems to show that from the beginning of 1901 until its close, Dr. Seery abstained altogether from the use of what Miss Seery describes as “hard” liquor, so the discussion may be confined to the answers of the last two above questions? The jury divided as to both—five jurors finding that there was no misrepresentation in either, the other two finding that there was misrepresentation in both. It is a mistake, I think, in cases like this, to speak of the representation as being fraudulent—jurors are frightened by such a suggestion and are apt to be misled from the real issue. The simple question is, were these statements of Dr. Seery untrue? In *Thomson v. Weems*, 9 A. C. 671. Lord Watson, in speaking of the warranty in that case,

at p. 687, says, "I agree with Lord Rutherford Clark, that the import of the answer is precisely the same as if the deceased had affirmed: first, that he was temperate in his habits; and secondly that he had always been strictly so, In its plain and ordinary sense, that statement is an *averm*-ment of fact and not a mere assertion of the opinion or belief entertained by the assured with regard to that fact. It there appears to me that whatever may be the import of the word 'temperate' (which is a separate matter), the assured must be held to have warranted, but that the assertion was true according to his sincere conviction, but true in point of fact; and consequently that in order to establish a breach of warranty, it is not necessary for the appellant to prove that the assertion was morally false."

Life insurance companies base their premiums on the average length of life. It is, therefore, important for them to know whether there is anything exceptional in the health or habits of applicants for insurance to take their lives out of the average, so that they may refuse the risk altogether, or take it at an increased premium. They apparently do not object to insuring the lives of those who use intoxicating liquor in moderation, but they wish to avoid risks on lives which are likely to run short of the average, either directly from the strain put upon them by an excessive use of stimulants, or indirectly from disease owing its rapid development, if not its origin, to the same cause. I need scarcely refer to the evidence of Dr. Wolverton as to the necessity for accurate information as to the habits of those seeking insurance, by reason of the fact that the excessive use of intoxicants tends to impair the constitution and shorten life. That seems to me to be common knowledge.

What is the evidence? I shall only refer to the testimony of two witnesses. In the first place what does Miss Seery herself say? She naturally speaks without any desire to make the case appear any worse than it really is. She and her brother lived together all their lives, and for the last nine or ten years of his life she had taken charge of his home. She says that during all this period, with the exception of the year 1901, he was in the habit of taking liquor, that he generally kept it in the house, though not in large quantities. During this period he was in the habit now and again—Miss Seery could not tell how often, except for the year 1902, when she remembers two occasions—of taking what he called rest. Men who are actively engaged

in the business of professional or business life secure their recreation by various methods and from various sources according to their tastes and fancies. Dr. Seery was not a person who ever took a vacation as we ordinarily understand that word; but as a substitute for it he took these "rests." On her examination by her own counsel she was asked the following question, "In regard to those occasions which have been spoken of as rests, how would that come about? Was it in connection with his taking or not taking any vacation?" Her answer was this: "I remember my brother saying to me that he wasn't going to make any calls, that he was going to stay in the house and take a rest. 'I suppose people will think I am drinking very hard because I am in the house,' he said, 'but I don't take any holidays and I am going to take a rest,' and he was taking liquor, of course, during that time." Q. "Instead of taking a rest abroad on a trip or vacation he took his rest at home?" A. "Yes." During these rests, he was taking liquor, "tippling a little," visiting a few patients, refusing to see others, and his countenance, usually pale, became flushed from the use of the liquor. Miss Seery was instructed that he would on these occasions see some particular people, and others he would not receive. She was asked the following questions:—Q. "During these occasions when he was taking a rest you told people that he was out of town, generally, did you not?" Her answer was this: "Well, I don't just remember what I told them. I told them he couldn't see them, or something similar to that, or that he wasn't at home, or something similar." Q. "On these occasions he stopped in the house a great deal more than he ordinarily did?" A. "Yes."

The evidence of Miss Seery goes to shew that her brother abstained from drinking altogether during the year 1901, but in the early part of January, 1902, he seems to have taken another rest of a week. During that time he was required as a witness in a suit against Dr. Atherton. He did not go and assigned as one of his reasons that "he looked as if he had been drinking, his face was so flushed." Miss Seery's personal knowledge of her brother's habits was derived from her observation of them at home. What he took in the way of stimulants at other places she of course knew nothing, she could only gauge by appearances. Her sister, Mrs. Condon, spent a year with her and the doctor, from August, 1899, to August, 1900. Shortly before

Mrs. Condon left for her own home, these two sisters took it upon themselves to speak to their brother and advise him to give up the use of liquor altogether. Miss Seery says that she did not consider that his drinking was injuring him, but that it was injuring his business, and that it was for that reason that she spoke to him.

I pass on to the evidence of Alexander S. Murray. Mr. Murray was intimately acquainted with Dr. Seery the last twenty years of his life. I quote from his evidence: "Q. Did he indulge in the use of intoxicating liquors? A. Yes. Q. Did you ever see him drunk or intoxicated? A. No, I never saw him but what he could take care of himself. Q. That is, he wasn't sufficiently drunk that he couldn't take care of himself? A. No. Q. But was he in a condition which would ordinarily be regarded as intoxicated? A. Well, I suppose you might call it that. Q. Did you frequently see him in that condition. A. Oh, quite often during those years. I don't mean any particular time. Q. But throughout those years? A. Yes. . . . Q. Do you remember his drinking heavily on any particular occasions when he was with you? A. What do you mean? Q. Taking a large number of drinks on occasions? A. I have seen him take eight or nine at a time, yes. Q. Within how long a time would that be? A. Oh, a couple of hours or so. Q. And did you see him do that quite frequently? A. Oh, no, not very often; just occasionally. Q. Where would this be? A. Oh, at different places. Q. In the city of Fredericton? A. Yes."

That Dr. Seery was in the habit of constantly taking intoxicating liquors there can be no doubt, and if his use of them was a moderate use as within the meaning of the word as in this policy, then the defendant company has nothing to complain of, because it accepted the insurance with full knowledge of his habits in that respect. I am altogether unable to bring my mind to the conclusion at which the jury came on this question. On admitted facts about which there is no contradiction, they have drawn inferences and conclusions which seem to me to be altogether unwarranted and unreasonable. Is it reasonable to class as a moderate drinker a man who habitually for at least the last ten years of his life, except one, was not only drinking daily, but who every now and again for a week at a time deliberately retired to his own home, practically abandoned his practice for the time, and simply gave him-

self up to drinking, for that is beyond question what he did do, and all this under the silly pretext that he is taking a vacation, and in that way securing a needed rest from the worry of his daily work. It is usual for medical men to adopt this method of taking a holiday? Miss Seery and her sister, so long ago as August, 1900, eight months before this insurance was applied for, called their brother's attention to his drinking habits and advised him to give up the use of liquor altogether, because, as they said, it was injuring his business. Medical men, so far as I have heard or observed, do not find their practice injured by a moderate use of stimulants. It was evidently because Miss Seery and her sister saw that Dr. Seery's tendency to drink was wearing on him, that he was drinking to excess, that they felt constrained to speak to him and advise him to abstain altogether, as his habits were likely to injure his practice. Take Dr. Seery's own remark as he entered upon one of his periodical weeks of rest, "I suppose people think I am drinking very hard because I am in the house." Is it at all probable that such a suggestion should have occurred to the mind of Dr. Seery without his being conscious that there were good grounds for it? He seems to have sized up the situation differently from the jury. His view was that the public would infer that these periodical "weeks of rest," which were spent in drinking and ended in flushed faces, during which he remained at home, neglected his practice, refused to receive callers, and gave as an excuse that he was out of town, were not only spent by him in drinking, but, to use his own expression, "drinking very hard." The jury seem to have thought these rests the ordinary incidents of a moderate and temperate life. In that conclusion from these facts I do not agree. I think it altogether unreasonable and not a legitimate conclusion from the undisputed facts. Now Dr. Seery himself knew all these facts and I dare say much more, and I am unable to see how he could have, on the 13th of April, 1901, represented to the defendant as a basis for this insurance that his consumption of wines, spirits and malt liquors had been moderate in the past, and that he had not at any time of his life used them to excess. This statement is under the evidence in this case I think untrue; and in saying that I do not understand the last question as directed to mere isolated cases of excess such as may occur to any one of moderate habits.

As to the second point in this case the evidence shews that Dr. Seery in order to secure the reinstatement of the policy in 1902, made and signed the following statement required by the company: "I hereby request the above named company to accept payment of the premium, \$33.70, due on the 3rd day of June last on policy No. 22482 on the life of Frederick J. Seery, hereby expressly declaring and agreeing that the acceptance thereof shall be on the faith of and conditional upon the truth of the following statement: That since the time of the medical examination and report which formed the basis of the said policy, there has been no change in the character of my family history, nor have I suffered from or been affected by any disease, sickness or accident, and that I am now in good health and of temperate habits." This statement was made on the 8th of August, 1902, and the medical examination referred to was made on the 27th of May, 1901. So that the validity of the policy arising from its reinstatement depends upon the truth of Dr. Seery's statement that he was on the 8th of August, 1902, in good health and of temperate habits. In answer to a question put to the jury two of their number found that he was not of temperate habits at the time, but they all agreed that he was then in good health. So far as his health condition is concerned I should not feel disposed to disregard the jury's finding. There was evidence to support both conclusions, and although I think it preponderated against the view which the jury entertained that was their unanimous opinion, and I think it ought not to be disregarded. As to the question of temperate habits. I need only here refer to the evidence which relates to the period between May 27th, 1901, and the 8th of August, 1902. Assuming that for the year 1901 Dr. Seery abstained altogether, what took place so soon as the new year came in? He simply returned to his old habits and took one of his rests for a week. He then continued precisely as before, and some time very near the date of his statement, probably shortly after it was made in August, 1902, he took another week's rest. If his habits previous to January, 1901, were not temperate, they were not so after January, 1902.

I am altogether unable to agree with the jury's view as to what is to be understood in a case like this as temperate habits.

It is true that this is a second trial, and it has been put forward that in such cases after a finding of fact by two juries it is unusual to send a case down for another trial. If that rule has any application to a question of fact like the present, it has none in this particular case. The new trial was granted before on the ground that the answers to the questions left to the jury were so unsatisfactory that they ought not to be regarded. In fact it was the opinion of the Chief Justice before whom the case was tried that the verdict should on the evidence have been entered for the defendant company. See the case as reported in 38 N. B. R. 96. And so far as the question of intemperate habits is concerned even that jury did not find as the present one has. They were asked the following questions and gave the following answers:—

Q. Did he (Dr. Seery) then (that is on August 8th, 1902) know that he was not of temperate habits in the summer of 1902, and that during that year he had been drinking to excess? A. 4 yeas, 2 nays, and one no reply.

Q. Did he at any time of his life, previous to the making of such declaration (that is when the policy was applied for), use spirits, wines or malt liquors to excess? A. One yea; 3 nays; 3 no reply.

Q. Was the deceased at the time of making such request (that is to reinstate the policy) of temperate habits? A. 3 yeas; 4 nays.

So that on this question as to temperate habits, both at the time the policy was issued and at the time it was reinstated, there was no finding by the jury at all.

I regret to differ from my brethren on a question of this kind, but I am altogether unable to agree that a man of Dr. Seery's admitted habits is correctly or truthfully described as a man of temperate habits, or that when he said in his declaration on which his policy is based that he had not at any time of his life used wine, spirits or malt liquor to excess, he told the truth. He may have thought he was doing so, but in my opinion that is altogether irrelevant. The question is, was that statement true. If it was not then the plaintiffs cannot recover. I think it was not.

I think there should be a new trial.

LANDRY, J.:—This is an action on a policy of insurance on the life of Frederick J. Seery to recover \$1,000. The policy is dated June the 14th, 1901, to run from June the

3rd. The application was made in April, 1901. The first premium was paid and the policy issued. The second premium was not paid but the policy was afterwards renewed by the insured paying the second premium and by the further complying with the requirements of the company as to certificate of health, etc. During the currency of the policy so renewed, the insured died.

The plaintiffs proved the application, the policy, the application for renewal, the renewal, the death, the probate of the will of the deceased in this Province, a written notice of the death to the agent of the company in this province, the receiving from the company at Hamilton, Ontario, through one of its directors, blank proofs of claim, the filling in of the blank forms and the receipt of such by the company at Hamilton. They also proved that a certified copy of the will of the insured and a copy of the letters testamentary had been sent to the company and received by them. The company made no objection to the insufficiency of the proofs of death, but after considerable delay, refused to pay for reasons stated in the following letter:—

Hamilton, Canada, May 14th, 1903.

R. W. McLellan, Esq.,
Barrister,

Fredericton, N.B.

Re Seery Policy No. 22482.

Dear Sir,—The company have instructed me to write you with reference to this claim. As I understand the facts, the policy expired on the 3rd July, 1902, for non-payment of premium due 3rd June last, but the company, at the request of the insured, and upon the faith of his statements contained in his written warranty dated 8th August, 1902, agreed to accept the overdue premium. In this warranty the insured expressly stipulated and agreed that the acceptance of the premium should be on the faith of and conditional upon the truth of his statements therein, to the effect that since the medical examination and report which formed the basis of the contract he had not suffered from or been afflicted by any disease, sickness or accident, and that he was then in good health and of temperate habits. The company have since his death procured evidence which clearly establishes the fact that the deceased was for at least six months prior to the date of the warranty afflicted with cancer or ulcer of the stomach and from the effects of

which he died, and that the statements contained in his warranty were untrue to his knowledge. The company are therefore in no way liable under the contract, and will of course resist payment of the claim. Without prejudice in any way to the company's rights in the matter, I am prepared to advise them to return the premiums paid since the warranty, on the understanding, of course, that your clients release the company from all further claims in respect thereof.

Yours faithfully,

Thos. C. Haslett.

The plaintiffs, under these conditions, could with reason insist that the defendants waived all other defences open to them originally and could at the trial urge as a defence only the grounds stated in this letter, viz.: The breach of warranty on the part of the insured, given to obtain the renewal of the policy. The defendants however put on record as many as eighteen pleas.

The main issues raised and contested on the trial may be reserved to this:

1st. The policy was obtained by misrepresentations of facts, untrue statements and suppression of facts material to the risk.

2nd. The renewal of the policy was secured by similar means.

3rd. No sufficient proofs were opened of the cause and manner of death.

The alleged fraud, misrepresentation and concealment were particularly and essentially as to two matters, that is to say: The health of the assured and his habits.

1st. In his application originally the assured stipulated that—

(a) If any misrepresentations or fraudulent or untrue answers were made;

(b) If any fact which should be stated to the company was suppressed;

(c) If any violation of the covenants, conditions or restrictions of the policy should occur, the policy should become void.

2nd. In the policy the insured contracted:—

(a) That due notice to the company would be given by his executors and proof to the satisfaction of the board of directors, of the death and age of the assured, and of

the time, manner and cause of his death, without which the company would not be liable.

3rd. In the written application for a renewal of the policy the assured gave a warranty that:—

(a) Since the time of the medical examination and report which formed the basis of the policy, there had been no change in the character of his family history, nor had he suffered from or been affected by any disease, sickness or accident, and that he was then (at the time of signing the warranty) in good health and of temperate habits.

All the issues were found by the jury in favour of the plaintiffs by the following answers to the questions left to them:—

Questions by the Court:

1. Q. Is the policy sued on, the deed of the defendant?

A. Yes.

2. Q. Was the defendant induced to make the policy by the fraud of Dr. Seery? A. No.

3. Q. If yes, in what did the fraud consist?

4. Q. Was the defendant induced to reinstate or revive the policy by fraud, concealment and misrepresentation of the doctor in the paper called the warranty? Five jurors, No; two, Yes.

5. Q. If yes, in what did that fraud, concealment or misrepresentation consist? A. Two jurors claim that he misrepresented his habits.

6. Q. Was the policy renewed from the 3rd of June, 1902, to 3rd of June, 1903? A. Yes.

7. Were the representations made by the Dr. (Seery) in his application and in his warranty all true? A. Five jurors, Yes; 2, No.

8. If any were not true, were they untrue to the knowledge of the Dr. (Seery)? A. No, not to his knowledge.

9. Q. If any were not true, were such untrue representations material to the risk? A. Two think intemperate habits material to risk.

10. Q. Were the proofs of death as presented to the defendant company such as reasonably to satisfy the Board of Directors? A. Yes.

Defendant's Questions:

1. Q. Were the representations made by the deceased, Frederick J. Seery, in his application for insurance, as to his consumption of wines, spirits or malt liquors, and his past use thereof, untrue? A. Five jurors say No; two say, Yes.

2. Q. Did the deceased, Frederick J. Seery, at any time in his life previous to the making of such application or declaration, use wines, spirits or malt liquors to excess? A. Five jurors say No; two say Yes.

3. Q. Did the deceased, Frederick J. Seery, after the medical examination and report of May 27th, A. D. 1901, which formed the basis of the policy and before the eighth day of August, A. D. 1902, the date of the request to the defendants to revive the policy, use wines, spirits or malt liquors to excess? A. Five jurors say No; two say Yes, from the 1st of January, 1902.

4. Q. Had the deceased, Frederick J. Seery, after the medical examination and report of May 27th, 1901, and previous to the warranty of the eighth day of August, A. D. 1902, suffered from or been affected by any disease or sickness? A. No.

5. Q. Was the deceased, at the time of his making the warranty on the eighth day of August, A. D. 1902, in good health? A. Yes.

6. Q. Was the deceased, at the time of his making the warranty on the eighth day of August, A. D. 1902, of temperate habits? A. Five jurors say Yes; two say No.

7. Q. Were the representations made by the deceased in his application for insurance, as to his consumption of wines, spirits or malt liquors, material to the risk or contract? A. No.

8. Q. Were the representations contained in the warranty of the deceased, made on the eighth day of August, A. D. 1902, that he was then in good health and of temperate habits, material to the risk or contract? A. Five jurors say No; two say Yes.

9. Q. Was the deceased in poor health on the twenty-fifth day of August, A.D. 1902, when the overdue premium was paid and the policy revived? A. No.

10. Q. Had the deceased after the medical examination and report of May 27th, A. D. 1901, which formed the basis of the policy, and on or previous to the giving of the renewal receipt on the 25th day of August, A. D. 1902, suffered from or been affected by any disease or sickness? A. No.

I believe the onus was on the defendants to prove the issues raised on their pleas to make out the defences pointed out herein. The jury having found in favour of the plaintiffs, the decision for the Court to arrive at on these mat-

ters of fact is, whether the proof submitted was such as reasonable men might base a verdict thereon as found in this case. I believe there is evidence on which reasonable men could find the facts as found in this case. I believe the jury, having, as in this case they had, the advantage of having the witnesses examined before them by very able counsel on both sides, being in a position to closely scrutinize the documents in evidence relied on by the defendants to make out their defence under the warranty, having the further advantage, several of them, of personally knowing the witnesses and the deceased, of being conversant with the social, professional and business habits of the country, and judging honestly of all these circumstances, could reasonably find as they did. Nor can I see that they acted on wrong principles in finding as they did.

Let us analyze some of the facts:—

The assured in his application made three answers to questions submitted to him by the company to this effect: "My present consumption of wines, spirits and malt liquors is nil; in the past it has been moderate; and at no time in my life did I use them to excess." The first answer is not questioned. To prove the untruth of the two last answers the defence put on the stand one of the plaintiffs, a sister of the assured, who had been his housekeeper for some ten or twelve years, and a Mr. Murray who was an intimate acquaintance of the assured. Both of these witnesses proved that the assured was not during his lifetime a total abstainer. Mr. Murray swore he had seen him in a condition which might be termed intoxicated, but had never seen him such as not to be able to take care of himself, and that he had seen him take eight or nine drinks in a couple of hours or so. The sister was made to go over a period of some ten or twelve years, and in no part of her testimony did she affirm that he had at any one time drank to excess or immoderately. She related circumstances that might be interpreted differently by different hearers of these details, but which circumstances, with her intimate knowledge of them, did not justify her to conclude that he had ever been an excessive or immoderate drinker. She had never seen him intoxicated. The strongest evidence given by her that made towards establishing immoderate or excessive drinking was in relation to certain periods during which the assured would give up some of his professional work. She said her brother, the assured,

called such periods "rests" and that during these periods of rests he tumbled. These rests she said were not frequent, and would continue perhaps a week at a time; that he never went off on a vacation but took these rests instead. That during these rests he was not confined to the house, did not give up his work, attended to the most important part of his professional work and attended to his most important professional visits; that his appearance on those occasions would be a little flushed; but that unless a person knew he was taking some, that person would probably think he hadn't taken anything. She said she had never seen the assured staggering. The evidence read in cold type may be subject to different interpretations, and may lead the impartial reader in the direction of a belief that the insured indulged in immoderate drinking during these periods of rests. To the jury who saw the witness, noticed the closeness and persistency of the able examination conducted as a cross-examination by the counsel of the defence, and who could judge of the witness' candour and desire to conceal nothing, it was not unreasonable that they should conclude that the proof of immoderate or excessive drinking failed. On that issue I am not prepared to say that the finding is not reasonable. This issue, let me repeat, though strongly insisted on at the trial and now, was not raised or foreshadowed by the defence in giving their reasons for refusing to pay the claim. In fact the main, if not the only matter insisted on as a ground for not paying, is found by the correspondence to be that the assured had broken his warranty in respect to his condition of health when he applied for a renewal of the policy; that he did guarantee that he had not suffered from or been affected by any disease, sickness or accident, and that he was then (at the time of signing the warranty) in good health, is not denied. It is claimed, and I believe rightly so, that the plaintiffs were not bound to furnish to the company, any proof, nor to give any information as a condition precedent to entitle them to recover, of and concerning his habits when he signed this warranty. He was bound by the terms of the warranty, but if there was a breach of it the onus was on the defendants to prove such breach.

Now we come to the contest as to the state of health of the assured when he gave this warranty. Again it was for the defendants to establish that his warranty in that

particular was false. I cannot find any proof in the evidence outside of matters of inferences, that the assured was not as to his health what he represented himself to be in this warranty, except such proofs as appear under oath in the answers given by the plaintiffs themselves, by Dr. Torrens and by Dr. Crocket, to the questions of the defendant company in the proofs of claim. Such answers, unexplained, left as written and sworn to, do establish that the assured was suffering from illness at or had been before the time of his applying for a renewal of the policy. But here again the jury had the advantage of having before them the very witnesses who had sworn to such answers. And the jury had before them the intricate mass of matters on which interrogatories are made by the company in this blank form of proof of claim, some of which matters can hardly come within the range of the knowledge of the persons so interrogated. Under such conditions honest witnesses, and it was for the jury to judge of their honesty, might without surprise to the trial Judge at any rate, convince a jury that the answers given by them under oath, and which answers were relied upon by the defendants to establish their case, were given without much consideration, and with no view or intention of fixing definitely the date or time of the commencement of the last illness of the assured, and were in point of fact not correct. They swore that the time or date was given only approximately and given because it was suggested to them, believing that absolute accuracy as to time was of no importance in any event. It should be borne in mind that when these answers were given in the proofs of claim, the plaintiffs were not aware of this warranty and their attention as to accurate time was not attracted in any way. The whole seven jurors agreed on the fact that there was no misrepresentation by the assured as to his health when he applied for a renewal, and I believe it was such a conclusion as reasonable men could come to under the evidence.

I believe the application made for the insurance money was a sufficient demand upon the company at Hamilton, to do away with the objection raised on that point, and particularly is it sufficient inasmuch as the defendants did not raise that question when they objected to the payment, but refused to pay on grounds specified by themselves in their correspondence. That view is also strengthened by the laws of Ontario put in evidence on the trial, which laws

give full authority to the executors duly named in this province to demand, collect and receive the money. The same statutory law obviates also the necessity of administering the estate in Ontario.*

As to proofs of death not being satisfactory to the board of directors, the answer is that the board by its correspondence shews itself satisfied on all points save and except two, viz., that of misrepresentation as to the state of his health when the warranty was given, and as to the representations then made of the habits of the assured.

The executors were not, as a condition precedent, bound by the contract to satisfy the board on any grounds arising out of the warranty; and if they were, the jury having found no misrepresentation as to those two grounds, it follows that the board has no reasonable ground for being dissatisfied.

I think I have covered all the main grounds raised for a non-suit or new trial, except the one urged for misdirection. It is contended that the trial Judge limited the consideration of the jury to the habits of the deceased, to the time he made the application for the policy. The whole charge read together does not support that view. Besides I know that such was not my intention, nor was it the case so far as I can remember the words used. One sentence in the charge is picked out to prove the contention of the defence; the sentence as reported is as follows, save the words in brackets which I believe I used, which I know I intended to use:—"You should take all these things into consideration and say whether at the time he made the application he was (or had been) in the habit of using liquors to excess."

For these reasons I believe the verdict should not be disturbed.

Motion for new trial or nonsuit refused.

*EDITOR'S NOTE.—Two of the grounds on the motion for nonsuit were: "There was no evidence of demand upon the company at its head office at Hamilton for the payment of the amount insured upon the life of the insured," and "the plaintiffs not having taken out administration of the estate of the deceased in the Province of Ontario or having ancillary probate of the will, they could not make a legal demand upon the company."

The Ontario statute cited is the Ontario Insurance Act (Rev. Stat. Ont., Vol. 2, cap. 203, sec. 106, ss. 1-6.)

On these points see also the judgment of Tuck, C.J. (38 N. B. R. at page 101, 3 E. L. R. at page 64), on the former motion to this Court after the first trial.

DOMINION OF CANADA

EXCHEQUER COURT.

JUNE 30TH, 1908.

REX v. MCKAY.

*Expropriation of Land—Public Work—Government Railway
—Compensation—Sales as a Criterion of Value—Costs.*

CASSELS, J.:—This is an information filed on behalf of the Crown to have it declared that certain lands the property of the defendant are vested in His Majesty.

The lands were taken for the construction of the branch line of the Intercolonial running to Sydney Mines.

The information claims three separate parcels of land referred to in the evidence as lots Nos 1, 2, and 3. Each lot has to be separately dealt with.

Lot 1.—Prior to the expropriation the defendant owned the lot fronting on the public highway, the frontage being about one hundred feet to the north. The western boundary of the lot from the public highway to the right of way of the Nova Scotia Steel and Coal Company extended a distance of 254 feet. The eastern boundary to the same railway extended 314 feet.

The land expropriated was 20 feet on the west and 36 feet on the east. These lands were taken off the southern portion of the lot. The Crown offered \$50 for this lot.

It is not claimed that any damage to the north of the lands expropriated has been occasioned by the expropriation, the claim being merely for the value of the land taken.

The lot is a farm lot, but now the defendant contemplates dividing it into building lots, and by a plan divides the lot. He contemplates a street on the west 20 feet wide. He would divide it into lots, two on the main street of 50 feet each in width, with a depth of 100 feet. This would leave him with three lots running east from the present road with a depth of 100 feet, and a fourth lot, after the expropriation of 21 feet in width, with a depth of 100 feet and the eastern boundary of a width of 60 feet.

It was contended that this lot of 21 by 100 could not be utilized as a building lot. I do not concur in this view. The lot widens gradually from 21 feet on the west to 60 on the east, and anyone desiring to build upon it could place

his house further from the street and have a yard, or even a better lot, as far as size goes, than the lot immediately north of 40 feet in front, 40 feet in rear and 100 in depth. The land expropriated has a frontage of 20 feet on the west and 36 on the east running back 100 feet.

Before the expropriation the whole property was bounded on the south by the Nova Scotia Steel and Coal Company's railway. The whole property was purchased by the defendant on the 25th December, 1901, for \$350.

I am of opinion that the sum of \$50 offered by the Crown for the land taken was ample compensation.

Lot 2.—The second lot referred to has a frontage of about 133 feet on Bras d'Or Road. It has a depth of about 200 feet on the east side and 220 feet on the west side. This lot also on the south was, prior to the Intercolonial expropriation, bounded on the south by the Nova Scotia Steel and Coal Company's railway. The defendant purchased two acres in 1903 for \$600.

The Crown expropriated 2,461 square feet off the south portion bordering on the Nova Scotia Steel and Coal Company's railway. There is a house on this lot owned by defendant's father, 35 feet to the north of the lands expropriated by the Intercolonial railway. The land taken for the railway has a frontage of 17 feet on the west and 20 feet on the east. The Crown has offered \$200 as compensation for the lands taken and all damage. I think this amount is ample to cover any possible claim of the defendant for land taken and any possible depreciation of the value of the balance.

Lot 3 referred to in the evidence presents greater difficulty.

The defendant purchased a property comprising five lots shown on exhibit No. 5 of defendant's exhibits. These lots fronted on the main road to Bras d'Or on the north-west, and were bounded on the south-east by a street called McKay street. On the opposite side and fronting on McKay street on the north-west was another parcel of lots, seven in number, shown on Exhibit No. 5.

The five lots and the seven lots were conveyed by Vickers to defendant on the 21st May, 1903, the consideration being \$1,947. The defendant did not purchase or obtain by his grant Vickers street. The lands expropriated for the rail-

way are off the southern portion of the land west of McKay street, and have a depth of 23 feet on Bras d'Or Road, and 20 feet on McKay street extending across the lot.

This block of land west of McKay street, while shown on plan, defendant's exhibit No. 2, as divided into five lots, was purchased as a block of land, and, so far as the evidence goes, still forms one block of land.

The defendant has shown on his map, exhibit No. 2, how the property could best be utilized by dividing it as he suggests.

He claims large compensation for the injury to this block composed of five lots, by reason of the impossibility of using the land after the railway have taken off the portion indicated.

Reid, the government appraiser, prepared a plan, plaintiff's exhibit No. 2, showing how the land, after expropriation, can be laid out to the best advantage.

The Crown offered \$185 for the land taken and for damages.

This offer was apparently made on the supposition that McKay owned the street called McKay street and the seven lots on the east, as well as the block shown containing the five lots, and that he would be enabled to utilize the balance of the block shown containing the five acres, as well as McKay street, and the block containing seven lots, and that the railway enhanced the value of the balance of the whole parcel. Reid would allow \$286.12 made up of land taken, 4,653 square feet at 4 cents a square foot, equal to \$186.12 and \$100 for depreciation.

After considering the evidence as to sales, I think the defendant should receive the sum of \$400 in full for the land taken and damages.

It is next to impossible to arrive at an exact sum, it being difficult to obtain absolute evidence, but I think the sum of \$400 would be fair compensation.

The result of the case is, that for lot No. 1 the Crown should pay \$50 without interest.

For lot No. 2, the sum of \$200 without interest.

For lot No. 3, the sum of \$400 with interest to date of judgment.

The defendant having failed as to lots Nos. 1 and 2, and partially succeeded as to lot No. 3, I think it a case in which each party should bear its own costs.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 30TH, 1908.

REX v. WILLIAM PERO ET AL.

*Government Railway — Expropriation of Land — Value—
Damages.*

CASSELS, J.:—The information was filed on behalf of His Majesty to have it declared that certain lands described in the information belonging to the defendant were vested in the Crown, and that the sum of \$160 tendered as compensation was a sufficient amount for the said lands.

The defendant claims that the lands so expropriated were of the value of \$1,000. It should be stated, however, that in making this claim of \$1,000 the defendant included lands comprising a larger area than as described in the description of the Chief Engineer.

Sydney Mines is said to contain a population of about 6,000. In common with other would-be great cities, it had its boom about 1902.

The evidence in the case shows that no difference in values of property exists between the time when the railway entered into possession and in 1907 when the plan was filed.

At the request of counsel for plaintiff and defendant, I visited the premises in question, and such inspection assisted me materially in coming to a conclusion as to the proper compensation to be allowed.

The trial, which was commenced on Thursday, the 21st May, was interrupted by the inspection and closed on the 22nd May.

Pero, the defendant, owns a block of land with a frontage on Main street of 140 feet. Main street is the northern boundary of this lot.

He also owns a block of land south of the Nova Scotia Steel and Coal Company's railway.

This railway intersected the lands of Pero a great number of years ago, approximately 30 years, and no road or way has been laid out to permit communication between the lands to the south of the Nova Scotia Steel and Coal Company's railway and the lands to the north of this latter railway.

This lot on the south of the Nova Scotia Steel and Coal Company's railway is irregular in shape, having a depth on the west side of 150.6 feet and on the east of 322 feet.

The Intercolonial Railway expropriated, according to their plan, the land in dispute. The land so expropriated was immediately adjoining to the north the property of the Nova Scotia Steel and Coal Company's railway, and comprised a piece of land with a frontage north and south on the east side of 24 feet, and on the west side of 30 feet.

They thereupon widened the cut of the Nova Scotia Steel and Coal Company's railway, placing their rails immediately north of the rails of the Nova Scotia Steel and Coal Company's railway, the north bank of the Intercolonial and the south bank of the Nova Scotia Steel and Coal Company's railway forming the banks of the cut used by both railways. The bank to the south of the Nova Scotia Steel and Coal Company's railway is considerably higher than the bank to the north of the Intercolonial.

After the expropriation, for the purposes of the Intercolonial Railway, the defendant was left in possession of his northerly field, with his frontage on Main street uninterfered with, and containing a depth to the northern limit of the lands expropriated on the west side of 450 feet and on the east side of 350 feet.

Both the field to the north of the Nova Scotia Steel and Coal Company's railway and the field to the south remain as formerly, vacant lands used for farming purposes, nothing on the ground or by map or otherwise indicating any subdivision into building lots.

On the east of the defendant's property a private street was laid out 24 feet in width, the western boundary of this street being the eastern boundary of the defendant's lands hereinbefore described.

A water pipe extends from Main street down to the end of the McNeil property, shown on plan exhibit "A" of the defendant's exhibits.

When called a private street, it must not be thought that it is a street such as would be called such in a city.

It is much as it was when a field, the surface long grass braten down by use.

The defendant sought to prove that on the west side of the defendant's property, extending from Main street south, a street had been laid out by the Nova Scotia Steel Com-

pany immediately adjoining the lands of the defendant, the eastern boundary of the street being the western boundary of Pero's lands.

He failed in producing any legal evidence of the existence of such a street.

Subsequently to the closing of the evidence and argument, the defendant applied for leave to adduce further evidence to prove the existence of such a street. To avoid any injustice to the defendant, I allowed the opening of the case, and further evidence was adduced, but with an utter failure to prove, by any legal evidence, the existence of any such street.

The defendant deals with this case as if the expropriation was an expropriation of a town lot, and not of a portion of a farm.

No matter how the case may be looked at, in my opinion, the sum offered by His Majesty is more than sufficient compensation for the piece of land 24 by 30 expropriated for the purposes of the Intercolonial Railway.

It would amply compensate for all the land taken, together with any interest on the compensation money to which the defendant would be entitled.

Counsel for the plaintiff asked that the compensation should be fixed at a sum smaller than the amount tendered; but under all the circumstances of the case, and considering how comparatively small any such reduction would be, I do not think I can make any reduction.

The lands to the north of the Nova Scotia Steel and Coal Company's railway, including the lands expropriated and bounded by Main street, were purchased by the defendant for the sum of \$375 on the 3rd November, 1894. The field south of the Nova Scotia Steel and Coal Company's railway, the field as it is at present, was purchased by the defendant on the 9th August, 1894, for \$100.

On the 27th September, 1902, the defendant sold to James McNeil the lot shown on exhibit "A" (defendant's exhibits), for \$130.

This lot has a frontage on the private street of 73 feet by a depth of 100 feet.

It immediately adjoins the lands expropriated.

John McCormick, a merchant in Sydney Mines, valued the land in question, 40 by 100, at \$109. The lot in question

is merely 24 feet at one end, 39 feet in width at the other; the depth of lot, by the plan, being 150.4 feet; according to the engineer, 179 feet.

No claim for severance exists. The land has been severed for about 30 years by the Nova Scotia Steel and Coal Company's railway.

If in fact a road were put there from south to north, it would cut the lot in question so as to make the lot too shallow, if formed into two lots, for practical purposes.

I think the plaintiff is entitled to the declaration prayed for, and that the defendant William Pero must pay the costs of the plaintiff and of his co-defendant, if entitled to any costs, the costs payable to the plaintiff to be set off pro tanto against the purchase money.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 30TH, 1908.

REX v. GANNON.

*Government Railway — Expropriation of Land — Value—
Damages.*

CASSELS, J.:—The informations were filed by the Attorney-General on behalf of His Majesty to have it declared that certain lands, the properties of Pius Gannon and Margaret Gannon, are vested in the Crown.

The two properties were separated from each other by the lands of Hamilton, Margaret Gannon's property being to the north and Pius Gannon's to the south of the Hamilton property.

The property of Pius Gannon expropriated comprises 31,218 square feet, more or less.

The plaintiff offered \$500 as full compensation. The defendant claimed \$2,000.

The property of Margaret Gannon expropriated comprised 13,516 square feet, more or less. The plaintiff offered the sum of \$600 as full compensation. The defendant claimed \$2,000.

These two informations were tried together, some of the evidence in the former actions to be received as evidence in these actions.

At the request of counsel for both parties, I viewed the premises. Along the line of railway, on both sides of the track through the lands of Pius Gannon, it is a veritable swamp.

The lands of Margaret Gannon are slightly better.

I have dealt in former judgments with the character of the lands in the neighbourhood.

Since the advent of the Intercolonial, it seems that a swamp, with knolls scattered here and there upon which houses can be erected, are turned into town lots.

I think it unfortunate that so many of these people should be put to the costs of litigation in cases of this nature.

I think the compensation tendered in both these cases ample.

The declaration asked for by the Crown in each case should be granted, and each defendant should pay the plaintiff the costs of the separate action to which he or she is a party. The Crown to have the right to set off except as to intervening judgments.

Pius Gannon will receive \$500 less the costs.

Margaret Gannon the sum of \$600 less the costs.

Incumbrancers to be paid out of the compensation.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 30TH, 1908.

REX v. McDONALD.

*Government Railway — Expropriation of Land — Value—
Damages—Barn—Fixture—Compensation.*

CASSELS, J.:—This is an information by the Attorney-General on behalf of the Crown to have it declared that certain lands expropriated for the construction of the branch of the Intercolonial Railway to Sydney Mines are vested in His Majesty.

The Crown offers \$225 as full compensation for the lands taken, and for all damages to the land. The defendant demanded \$1,000.

The defendant's property has a frontage on Gannon street of 48 feet. The property was 100 feet in depth.

The railway has taken off the rear part of the north 26 feet. On the south 10 feet comprising 864 square feet.

On McDonald's property is a house and store 30 feet by 34 feet. The front part is 16 feet from Gannon street.

On the land expropriated for the railway is situate a small barn 11 by 15 feet. This barn rested on the ground on boards placed on top of some boulders. It is sworn that this barn cost \$108.43. Another small building was taken valued at \$12.84.

It was contended by counsel for the Crown that the barn was not a fixture, and therefore remained the property of the defendant after expropriation, and that the defendant is not entitled to recover compensation for his loss in respect of this barn.

In the absence of authority binding on me, I cannot accede to this contention. The Crown have expropriated the land on which it stands, have made no offer to leave it with the defendant and allow him to move it. He would be a trespasser if he attempted to remove it.

I find that the defendant is entitled to compensation made up as follows:—

Land taken	\$ 25 00
Barn	108 43
Small building	12 84
Injury by depreciation to balance of property.....	150 00
	<hr/>
	\$296 27

The sum of \$150 for depreciation is the value given by Mr. Reid, the government appraiser and agent, and I think his statement should be accepted.

I think the defendant should be paid the sum of \$296.27 with interest to the date of the judgment.

The sum tendered was \$225. I allow no costs to either party. The defendant made a claim for \$1,000.

It appears he sold to his sister, in 1904, a lot on the other side of the railway west of his property.

She apparently was a woman of means, and the defendant expected he would have a contract for building a house for his sister, out of which contract he hoped to clear \$200.

He also expected this house would be rented, and that the tenants would purchase at his store, and the loss from this he estimated at \$500 for five years—\$100 a year.

These two claims comprised about \$800 out of the \$1,000 claimed.

Some evidence was given of the loss of some eight to sixteen hens kept by the defendant, and the misery a cow would suffer by having to move her quarters.

A serious injury is also the fact that he cannot have a continuous clothes line, 100 feet in length, upon which to dry his washing.

I have not dealt with the hens and the cow or the clothes line, as I consider this evidence was tendered in order to reach the sympathetic side of the Court.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 30TH, 1908.

REX v. FRANCIS.

Government Railway — Expropriation of Land — Value—Damages.

CASSELS, J.:—This is an information by the Attorney-General of Canada to have it declared that certain lots, expropriated by the Crown for the branch line of the Inter-colonial Railway to Sydney Mines, are vested in the Crown.

The Crown has expropriated about one and one-fifth acres.

Francis originally owned nine and a half acres fronting on the public road to North Sydney on the north and on the south the line of railway of the Nova Scotia Steel and Coal Company. .

The land is situate outside the limits of both North Sydney and Sydney Mines.

The nine and one-half acres were purchased on the 22nd May, 1893, for \$250

The railway strip runs through the lot east and west, leaving two and one-tenth acres between their right of way and the railway of the Nova Scotia Steel and Coal Company.

A farm crossing with gates has been furnished connecting the south with the north.

A small house, very old, was taken by the railway, valued by the defendant at \$300, by McDonald at \$200, and by J. Buchanan, without the addition, at \$200. I think if the defendant is allowed \$225 for this house he is amply repaid.

The Crown has offered \$750 in full satisfaction of everything.

The defendant claims \$1,500.

If \$225 be deducted for the value of the house the sum of \$525 is left for the one and one-fifth acres of land expropriated and damages for severance.

I think the \$750 is full and ample compensation.

At the request of the parties I viewed the premises.

A great part of the land is broken and swampy.

As soon as the railway comes upon the scene these swampy farm lands become immediately valuable for building lots.

Evidence of various sales of small lots for workmen's houses in settled portions near the land is given to show the great value for town sites.

The evidence of damage for severance is very meagre.

I think the Crown is entitled to the declaration asked for, and that the defendant should pay the costs of the plaintiff to be set off against the amount tendered if no intervening rights exist.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 30TH, 1908.

REX v. JAMES DAY.

*Government Railway — Expropriation of Land — Value—
Damages—Costs.*

CASSELS, J.:—In this case the Crown offers \$300. The defendant claims \$800. It was agreed that the evidence taken in the case of *The King v. Luke Day* should be received in this case as far as applicable.

The lands in dispute were expropriated for the branch line of the Intercolonial Railway.

The lands of James Day fronted on the east on Gannon street. The frontage on this street was about 95 feet.

The lands taken by the railway embraced the frontage on Gannon street, 95 feet, running back northerly 72 feet, and on the south 64 feet 10 inches.

All the lands owned by James Day were bounded on the north by a public street called West street.

It appears from the evidence that, prior to the expropriation, a portion of the lands to the north-east of the lot was considerably lower than Gannon street, and was styled by one witness as a mud hole, but out of consideration to the feelings of the owner this contemptuous expression was recalled, and the fact left that the lands were lower at this portion of the lot and of a moist character.

Day's house is situate about 250 feet west from Gannon street, and it was at first contended that by reason of the Intercolonial being constructed his view to the east was interfered with and the house would have to be turned round so as to face north on West street.

Attention being called to the fact that if the lands fronting on Gannon street were sold as town lots the house would look out into the back yards of the houses built on this street, the contention was not pressed.

The lands to the north-east of the lot being lower than the railway embankment towards the northerly end of the land had necessarily to be raised, and in order to save a heavy grade up and down over the railway, Gannon street was diverted so as to give a level crossing over the railway.

The lands of the defendant James Day, as left after the expropriation, still front on Gannon street.

The corner lot now on Gannon and West streets is a better lot than the former corner lot, as it is on higher land, so that while the defendant loses the corner he previously had, he gets a new corner lot better than the former, and the lot immediately west of the land expropriated becomes the corner lot with a greatly enhanced value to what it formerly had with the lot in front of it before expropriation.

The land taken had a frontage of 95 feet on Gannon street with a depth of 72 feet on the north, and 64 feet 10 inches on the south.

The lands in question were used by James Day as a farm.

As soon as the railway entered the possibility of town lots loomed up.

At the request of counsel for both parties I viewed the lands.

Ross' evidence I place but little reliance on.

I think the offer of the Crown of \$300 was ample consideration for the lands taken, including all damages incurred by James Day.

The judgment will declare the lands to be vested in the Crown.

The defendant must pay the costs of the Crown to be set off pro tanto against the amount payable if the interest of the mortgagee does not intervene. If the mortgagee is entitled, the usual judgment will issue.

I think it very unfortunate that in this class of cases exorbitant demands should be made when a Crown railway has to be the paymaster, and the owner put to large expense instead of his coming to a reasonable settlement.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 30TH, 1908.

BARRETT v. THE KING.

Public Work — Fish-Dam — Negligence — Construction — Flooding of Farm Lands—Natural Causes—Damages — Evidence.

CASSELS, J.:—The petitioner in this case claims that he should be paid by the respondent, His Majesty the King, the sum of \$4,000 for, at the outside, 20 acres alleged to be completely ruined by the works complained of.

It appears, however, that \$4,000 is not sufficient compensation, so the petitioner claims an additional sum of \$2,000 for the raising of a road and rebuilding his bridge.

The total claim amounts to \$6,000, or \$300 an acre, assuming the acreage to be twenty, and for any damage for temporary severance.

It looks as if the petitioner has carried his exalted ideas of values and damages into the witness box.

I take an entirely different view both as to the value of his marsh and the injury caused, if any.

It appears that the petitioner is the owner of a farm comprising about 105 acres, of which 18 to 20 acres are composed of marsh lands.

A river called the Little River runs through his farm for about one-fourth of a mile. The road in question runs through the marsh and is connected by a bridge (if the word is applicable) with lands on the opposite bank of the river owned by the suppliant and forming part of his farm.

Barrett's land is approximately one and one-fourth miles higher up the stream than the point where the dam was constructed. From the dam the river continues about 500 to 600 feet, and then empties into Courtney Bay.

The normal flow of the river is sluggish, the difference in levels between the lands of the suppliant and at the dam being about one to two inches.

In June of 1906 the dam complained of was constructed. According to the evidence of Belyea the height of the dam, from the bed of the river as originally constructed, was 30 inches, or two feet six inches. Murdoch would make it one to two inches higher.

It remained at this height for about 15 days, when, by reason of a complaint made by one Carney, which I will refer to later, a portion of the dam, about 49 to 50 feet in length, was reduced in height by 17 inches, which left the height of the dam one foot one inch or one foot two inches. The dam was completely removed in May of 1907.

According to Murdoch's evidence the ordinary height of the tide would be 23.76 feet; the spring tides, 25.70 feet; extraordinary high tides, 28.4 to 29 feet. These measurements are taken from what the witness describes as a zero level.

On the same basis the dam, as originally constructed, was 24.25 feet, or 24 feet 3 inches. As reduced after the period of 15 days the dam would be 23 feet 1 inch.

It is obvious that even before the dam was lowered the spring tides would back the water up the river, the normal spring tide being 25.70 feet, while the height of the dam was 24.25 feet. After the lowering of the dam the normal, as well as the spring tides, would come to the top of the dam.

From the 1st of May, 1906, to the 1st of November, 1906, there would be about forty-five tides that would raise the water above the marsh. The suppliant himself admits that the spring tides covered the marsh.

During the 15 days there might have been a slight interference with the outflow from the original drain through the marsh, but the effect was so trifling as to make it unnecessary to consider it.

After the reduction no possible damage could have been occasioned when the height of the dam is considered and the height of the marsh. After the reduction of the height of the dam the marsh was from 26 to 35 inches higher along the bank of the river than the top of the dam.

Carney's marsh is near the marsh of the suppliant. His marsh was dyked and drained with automatic means of closing the gates as the tide rose, and opening the gates as the tide receded. The raising of the water interfered with the opening of Carney's gates and caused his lands to be flooded when the drainage water from the high lands above came on his land.

I think the suppliant's case fails. His contention that his cattle could not feed on the marsh after the dam was erected has, I think, no foundation in fact. His own witness, Edward Shillington, claims that both in the summer and fall of 1906 and in 1907 the cattle were on such portions of the marsh as the cattle could go on.

The road and bridge were built about 26 years ago; they have not been properly maintained, and any canting of the bridge or lack of repair in the road are attributable to time and not to the respondent.

The marsh is not drained—only one drain is in existence, possibly a second one, but the evidence is doubtful as to there being more than one.

I have not considered it necessary to deal with the question as to whether the dam in question is a public work.

The petition is dismissed with costs to be paid by the suppliant to the respondent.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 30TH, 1908.

REX v. HAMILTON.

Government Railway—Expropriation—Value of Land Taken.

CASSELS, J.:—This is an information filed by the Attorney-General on behalf of the Crown to have it declared that certain lands required for the branch line of the Intercolonial to Sydney Mines are the property of the Crown.

Hamilton owned about $13\frac{1}{2}$ acres of land fronting on Plant, or as otherwise known, Gannon street.

The railway expropriated about 42,649 square feet, slightly less than an acre.

The right of way of the railway in a northerly and southerly direction intersected the $13\frac{1}{2}$ acres, leaving to the west between the right of way of the Intercolonial and Gannon street about three acres. At the north end of the depth from Gannon street to the right of way of the Intercolonial is about 134 feet, on the south 257 feet.

Of the nine acres west of the Intercolonial right of way about $1\frac{1}{4}$ acres of the land are cleared land, the balance being mainly swamp land.

From Gannon street on the east to the right of way of the Intercolonial, there is a fall in the land of about eight feet.

The whole property is used as a farm as far as it can be farmed.

The railway has furnished two farm crossings, but without proper approaches. Counsel for the Crown now undertakes to provide approaches properly graded on both sides of the two crossings.

The Crown offered \$1,200 as full compensation for the lands taken.

The defendant claimed \$2,500.

I think \$1,200 ample compensation, and I also am of opinion that the defendant could easily have made the approaches, and after deducting the cost of the approaches have been recompensed.

I think the Crown should have made the approaches in the first instance.

I allow the defendant \$1,200 tendered, less \$100 fixed as the costs of the Crown, the reduction of costs being on account of the Crown not having made the approaches in the first instance.

The undertaking on behalf of the Crown will be embodied in the judgment.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 30TH, 1908.

REX v. MCPHEE.

*Government Railway—Expropriation—Value of Land Taken.
—Crossing.*

CASSELS, J.:—This is an information filed by the Attorney-General on behalf of the Crown, to have it declared that certain lands required for the right of way to Sydney Mines of the Intercolonial Railway are vested in the Crown.

The lands expropriated comprise about 7,808 square feet.

McPhee's land has a frontage on Gannon street of 62 feet, being the eastern boundary, and on the west 170 feet.

The reduction in frontage on Gannon street is owing to lots being sold to R. McDonald on the south, and an intervening lot between McDonald's and the land retained to his sister, Mrs. Matheson.

The depth's of McPhee's lot from Gannon street to the rear would be on the south 1,280 feet and on the north 1,360 feet.

The railway intersected the lot, leaving between the railway right of way and Gannon street on the south 67 feet and on the north 53 feet.

McPhee and his brother, who owned the land immediately to the north, had each agreed to dedicate 20 feet from front to rear, forming a street 40 feet wide from east to west.

This would reduce McPhee's frontage on Gannon street to 41 feet.

The embankment of the railway on the west is six feet in height. It is not quite so high on the east.

To the west of the railway the defendant had sold a lot shown on the plan 40 by 108 feet to Miss McDonald for \$110.

In 1887 McPhee had purchased the whole block for \$95.

The evidence shows that the land expropriated for the railway was wet land, the drainage flowing over this land.

The railway offered no crossing over the railway embankment, practically cutting off all the land to the west from any means of ingress or egress.

The plaintiff offered \$400 compensation for the lands and all damages. The defendant claimed \$1,600.

Counsel for the plaintiff now undertakes to put in a proper crossing on the north with proper approaches.

I am of opinion that such a crossing being furnished, the sum of \$400 would be reasonable compensation for the lands taken and any damages to the defendant.

The defendant should be paid the sum of \$400 and interest to date of judgment, and the plaintiff should pay the defendant's costs of the information.

The judgment will embody the undertaking as to the crossing.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 30TH, 1908.

CHAMBERLIN v. THE KING.

Government Railway—Negligence—Fire set by Sparks from Smoke-stack—Evidence—Burden of Proof.

CASSELS, J.:—The suppliants filed their petition, claiming damages against the respondent for loss occasioned by reason of a fire which on the 3rd May, 1905, destroyed the property of the suppliants.

It is alleged that the fire was caused by sparks emitted from engine No. 312 of the Intercolonial Railway.

The contention of the suppliants is that the netting on the smoke stack of this engine was defective and in bad condition on the day in question, and that therefore the respondent is liable.

The case came on for trial before the late Judge of the Exchequer Court at St. John during October, 1907, and voluminous evidence was adduced.

The argument of the case was adjourned, but before argument the late Honourable Mr. Justice Burbidge died.

The suppliants were anxious to avoid the expense of a further trial, and with the assent of the respondent the case was fully argued before me at St. John on the 14th day of May last.

There is a conflict in the testimony, and it is difficult for a Judge who has not seen the witnesses to determine the rights of the parties.

I suggested to counsel for the suppliants that considerable light might be thrown on the case if the subsequent history of engine No. 312 was traced, and allowed them to adduce such evidence, if so advised, on my return to St. John.

The sitting at St. John was resumed on the 2nd day of June, when counsel for the suppliants declined to produce such further evidence.

I have perused and re-perused and analyzed the evidence, and have come to the conclusion that the suppliants have failed to sustain their claim.

It is satisfactory to feel that if I am wrong in my conclusions the suppliants in an appellate Court will not be prejudiced by my findings of fact.

The engine in question, No. 312, arrived in Campbellton on the 3rd May, prior to 8.30 a.m. She pulled out from Campbellton about 13.30 (1.30) p.m. for St. Flavie. She was hauling a train comprising, according to the evidence of Dorion, the conductor, 34 cars, 21 of which were empty and 13 loaded.

The premises of the suppliant were situate about one and one-fourth miles west of Campbellton. The engine No. 312 was, according to the evidence of McKenzie, the driver, a new engine about three months old.

On the day in question there was a strong north to north-west wind blowing. The fire originated in a barn of the suppliants distant from the track to the south about 65 or 70 feet.

The suppliants attempted to prove that there is a considerable up grade on the railway passing the suppliants' premises, but I think this fact is not established. I think the fair conclusion to be drawn from the evidence is that

the fire originated from a spark or sparks emitted from the engine.

If this finding be correct the onus would still rest on the suppliants of satisfying the Court that such fire was caused through the defect in the engine, and that by reason of such defect and the failure to remedy it the Crown is liable for the loss occasioned.

It was not contended that the statute of May, 1908, amending the statute relating to government railways, applied. It was conceded that this Act is not retroactive.

It is clear from the evidence that the strictest precautions are taken by the officials of the Intercolonial to ensure an examination of all engines on arrival at and departure from Campbellton, and at and from St. Flavie, and records are kept as to the state of engines on arrival and departure.

As stated, the engine in question arrived at Campbellton on the morning of the 3rd May, prior to 8.30. On arrival it was found that the netting was defective. The netting was gone on the right side between the plate and the angle iron for about 10 inches.

According to the evidence of Cerdic Steeves, the inspector, it would take about 15 minutes for a mechanic to repair the netting.

It is admitted that all the appliances of the engine, including the netting, were of the best.

John Devereaux, locomotive foreman, states that the entry in the record book shows that on arrival at Campbellton on the morning of the 3rd May the netting was "bad." The same record shows that on departure the netting was reported "good." The engine arrived at St. Flavie in the early morning of the 4th, and the records show that on arrival "netting good," also on leaving St. Flavie "netting good."

Bourdreau, the locomotive foreman at St. Flavie, can only testify from the records.

There is however the positive evidence of Larrivee that he examined the netting of No. 312 at St. Flavie between 7 and 7.30 a.m. of the 4th May, and found the netting in good repair. It is proved that no repairs were made at St. Flavie.

On the return of the engine No. 312 to Campbellton, Devereaux, who was waiting for the engine to come in, testifies that the netting was all right. He had heard statements made that the fire had been occasioned through a

defect in the netting and was in consequence on the look out for the engine.

On the 3rd May, prior to the engine leaving Campbellton, Cerdic Steeves examined the engine. There was present with him Kean and Sargeant. Kean testifies that Sargeant was at the engine for over 15 minutes inside and with tools, and although he cannot swear the netting was repaired, his inference is that it was so repaired by Sargeant.

Sargeant's evidence is more of a negative than of positive nature. He cannot remember making the repairs, but a man in his position with so many engines to attend to could hardly be expected to remember.

I think the engine was repaired, and by Sargeant. There is no dispute that he was there and with tools, and for a time long enough to make the required repairs.

It is hardly conceivable that considering the strict rules applicable the officials would permit an engine with defective netting to leave Campbellton.

All the records at Campbellton and St. Flavie show that repairs must have been made.

If no repairs had been made then the records are false and the witness Larrivee has given false testimony.

In support of the supplants' claim the evidence of one O'Brien is produced, and if his evidence were accepted it would establish the fact that the statements in the records are untrue and that the evidence of Larrivee is false.

I think the evidence of O'Brien when analyzed shows that he is not to be relied upon.

He was a boiler maker in the employ of the Intercolonial on the 3rd May. He was suspended on the following 24th July, and evidently bears ill feeling against the officers of the railway.

According to the evidence of Devereaux he had made threats that he would get even with the railway.

He was present when Devereaux examined the netting on arrival from St. Flavie on the 4th.

The statement of O'Brien is that on the 4th May he examined engine No. 312. He states that it had not been opened up, and that with the assistance of one Pratt he broke the joint. That he procured a piece of iron about seven-eighths of an inch, and that he and McLaughlin could work it up and down. He states that he drew the attention of McLaughlin, the night foreman, to the state of the netting.

Devereaux contradicts O'Brien as to his moving a piece of iron up and down, and as to the state of the netting. O'Brien's statements are in direct conflict with his entries and he is forced to admit that these entries are false. Neither Pratt nor McLaughlin were examined. O'Brien swears to a statement said to have been made by McKenzie to him, that "the engine was throwing fire to beat hells." This is denied by McKenzie. He also testifies to an interview with Cerdic Steeves between 4 and 5 p.m. on the date of the fire. This is denied by Steeves. O'Brien says he called Pratt's attention to the defect.

The suppliants have not accounted for the absence of Pratt.

It seems to me that it would be unsafe to hold that on this evidence the suppliants have satisfied the onus cast upon them of proving their cause of action.

The other evidence, with the exception of a statement made by Steeves, to which I will refer later, has not much bearing on the case. Mrs. Miller speaks as to the fire. She saw no sparks from the engine, and it is difficult to see how she could have seen them in the day time. Eliza Murchie saw no sparks. McBeath proves fire between the track and the fence after the engine passed.

Now the fire took place, according to Allison, about six feet from the upper end of roof on the west side of the lean-to. According to the evidence this was from 65 to 70 feet distant from the railway. A strong breeze was blowing. Probably the fire McBeath speaks of came from the grate. Cinders from the smoke-stack carried by the wind, would not likely fall on the ties, and if they did would not likely ignite so as to show the marks.

This fire was likely caused by live coal from the grate. Mahoney's evidence is to say the least overdrawn. Benjamin Steeves and David Miller merely testify to fires, but not likely from the smoke-stack.

The evidence of Cerdic Steeves to the effect that he told Appleton to repair the netting and that Appleton said he had not time "to fix it, to let her go out," is peculiar.

Considering the orders and that but fifteen minutes would be required to make the repairs, it is hard to believe he would make such an answer.

Appleton was called as a witness, but was not asked as to this statement of Steeves.

He says, however, that he would not have allowed a defective engine to go out.

In cases of this nature the sympathies of neighbours are apt to influence them in favour of assisting the losers.

I am sorry for the suppliants, as I feel their loss is attributable to the sparks from engine No. 312, but after the fullest consideration of the evidence I am unable to find in their favour.

The petition is dismissed with costs.

DOMINION OF CANADA.

EXCHEQUER COURT.

JUNE 30TH, 1908.

COLPITTS v. THE KING.

*Government Railway — Negligence — Injury to Passenger
Alighting—Damages.*

CASSELS, J.:—The petition is filed claiming damages against the respondent for injuries sustained occasioned by the negligence of the officers of the Intercolonial Railway. The plaintiff, a woman, at the time of the accident 74 years of age, accompanied by her husband (who was an elderly gentleman), and one Stiles (now deceased), purchased tickets for a trip from Penobsquis to Sussex and return, on the 11th September, 1906.

There was an exhibition at Sussex and an unusual number of passengers got off the train at Penobsquis on the evening in question.

The train arrived at Penobsquis about nine at night.

There was no light at the station. Stiles preceded the plaintiff's husband, and the wife followed in rear of the husband.

It appears that Stiles alighted safely.

As the husband was alighting the train began to move and he was thrown to the ground.

The train must have moved very slowly as it was stopped in less than one-half a car length.

The plaintiff was on the step of the car immediately behind her husband, naturally looking for her footing, and

following her husband, got off the moving car and was injured.

According to the evidence of Brand, when he saw the plaintiff she was coming out of the door and he saw nobody else.

If his story be correct, then the plaintiff, an elderly woman not accustomed to travel, must have lagged behind and allowed Stiles and her husband to alight while she was emerging from the car.

The story told by the plaintiff's husband, Weldon, and the plaintiff, is corroborated by the conductor Wilbur, who says that some passengers were still getting off.

I place little credit on the evidence of Brand.

On the night in question an unusual number of passengers got off at Penobsquis owing to the exhibition at Sussex.

The conductor states that a sufficient time was not allowed to permit of the discharge of the passengers.

He also states that the signal to start was not given, and that it was improper to have started the train until he had given the signal.

I think there is negligence proved and that the respondent is liable unless the plaintiff by her contributory negligence has deprived herself of any claim to damages.

A large number of authorities were cited by Mr. McAlpine, but they are all cases where the company in question was held not to be guilty of any negligence, and the cause of the accident was the voluntary act of the plaintiff.

In this case I do not think the plaintiff has deprived herself of her claim.

The circumstances are peculiar. She was an elderly woman getting off a train at night. She was following Stiles and her husband. She saw them alight. The motion of the train must have been very slight, and she did what most people would do, got off without at all realizing what she was doing. She was looking down in order to see the step.

I think it would be going too far to hold that under the circumstances of this case the accident was attributable to her contributory negligence.

I think the plaintiff is entitled to the sum of \$250 for damages. I think this amount will amply compensate her.

No doubt, she was injured and had concussion of the brain, and might have been very seriously injured.

She was visited twice by Dr. Burnett. After the second occasion he did not consider it necessary to pay her a further visit, and no further occasion arose for requiring his services.

Dr. Fleming, who was or is the doctor at her home, and who would appear to have paid her one visit, was not called as a witness.

According to the evidence of Mrs. Wallis, her daughter, the plaintiff's appetite is very good and has been so all winter.

While in Court it often happens that litigants claiming damages are nervous and require considerable propping up by the aid of cushions, etc., but I do not think any serious results have happened from the accident in question to entitle the suppliant to the amount claimed.

Her work about the house with a daughter and daughter-in-law to assist is about what one would look for in the case of a woman of her age.

Common knowledge would teach us that many a younger married woman would avail herself of the aid of a daughter in brushing and arranging her hair even if not disabled.

Judgment will issue for \$250 and costs.

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QUEBEC.

COURT OF REVIEW.

JUNE 22ND, 1908.

Coram, MATHIEU, PAGNUELO, MARTINEAU, JJ.

BOITEAU v. ETHIER ET AL.

*Trade-union—Resolution—Illegality — Shares—Distribution
—Members in Good Standing.*

In review of the judgment of the Superior Court, Montreal, Tellier, J., rendered the 13th June, 1907. Plaintiffs, members of a longshoremen's union, sued the defendants, also members of the same union, and asked by the conclusions of their action that a certain resolution passed at a meeting of the union, at which meeting the 17 defendants only were present, be set aside and be declared illegal and null, inasmuch as by such resolution the said defendants divided up amongst themselves, in equal shares, the monthly contributions of the members of said union for many years back, which contributions amounted to 75c. per month each, and by means of which contributions a large sum of money had been acquired by the union for the purposes of a benefit fund for the members of the union and of their families. The defendants pleaded that they were, at the time of the passing of the resolution in question, the only members in good standing in the said union. The Superior Court declared the resolution illegal, null and void, and condemns defendants to deposit in the hands of the prothonotary the respective sums they had received and also condemned the defendants to the costs.

MATHIEU, J.:—The plaintiffs' action was properly taken. The principal object of their demand was to obtain control

again over money which the defendants had wrongfully divided between themselves. Further, the mere fact of their being in arrears was no reason for the loss to them of the money in question. Judgment unanimously confirmed, with costs.

QUEBEC.

COURT OF KING'S BENCH (APPEAL SIDE). JUNE 19TH, 1908.

Coram, TASCHEREAU, C.J., BLANCHET, TRENHOLME, LAVERGNE, and CROSS, JJ.

REX v. GROULX.

Criminal Law—Theft—Crown Case Reserved—Leave to Appeal—Practice.

Appeal from the Court of King's Bench (Crown side), presided over by Mr. Justice Curran, and the verdict of a jury rendered, upon special leave received to state a reserved case for the Court of King's Bench (appeal side). The questions, raised by counsel for the accused, may be resumed as follows:—1. Did the charge of theft, brought against the accused in the first indictment, include a charge of receiving? 2. Was the plea of autrefois acquit to an indictment for receiving stolen money well founded? 3. Was the Crown, having charged the accused, in the second indictment, with having knowingly received money stolen by one Joseph St. Louis, bound to prove the guilt of St. Louis in order to convict the accused, or does article 849, Criminal Code, relieve the Crown from the necessity of either indicting and convicting said St. Louis prior to indicting and trying the accused? 4. Did the specific mention of St. Louis' name in said indictment in any way modify the application of said article §849?

To justify his refusal for leave to appeal, which was subsequently granted by this Court, Mr. Justice Curran made the following statement.

Hormidas Groulx was indicted for having, on the 7th October, 1906, in the municipality of the united counties of de Salaberry and Grandison, stolen and carried away from a house inhabited by Hermenegilde Labelle, hotelkeeper, of

the same place, a sum of \$185 in bank notes, also two cheques amounting to \$271, signed by E. J. Graham, the property of the said Hermenegilde Labelle, which were contained in a tin box. On this accusation he was tried before me. The jury, after deliberation, came into Court and, in the first instance, returned a verdict in the following terms: "Coupable d'avoir eu en sa possession de l'argent qui ne lui appartenait pas et qui avait été volé, et nous le recommandons à la clémence de la cour."

Thereupon I pointed out to the jury that there was no charge against the prisoner of having stolen money in his possession, and that their verdict amounted to one of acquittal, and, in consequence, they rendered a verdict of "not guilty" upon said accusation.

The prisoner was then put upon his defence on indictment for having kept in his possession money and valuables for an amount exceeding \$25, which had been stolen by one St. Louis in the house occupied by Hermenegilde Labelle, hotelkeeper, knowing the same to have been stolen.

To this indictment, the accused, by his counsel, pleaded that he had been acquitted for substantially the same offence in the trial just referred to in the indictment, and that, therefore, he was entitled to plead *autrefois acquit*.

Having heard counsel for the Crown and for the prisoner, I held to the following effect: Considering that the offence now charged against the prisoner in the present indictment is not included in the accusation of theft, in which the prisoner had been declared "not guilty," I therefore reject the motion of prisoner's counsel.

The prisoner was tried and convicted, and his counsel made a motion as follows: That inasmuch as there was no proof of theft by Joseph St. Louis, as mentioned in the indictment, inasmuch as the facts proved in the present case are substantially the same as those proved in the case of *Rex v. Hormidas Groulx*, accused of theft, wherein the said *Hormidas Groulx* was declared "not guilty"; inasmuch as the Crown should have proceeded in this case against said Joseph St. Louis, and against whom there is an indictment now pending, which must be tried in the present term, that the prisoner be discharged, inasmuch as the material facts, alleged in the indictment, have not been proved.

Prisoner's counsel, upon the rejection of that motion, then made a motion on the same grounds for a reserve case to be submitted to the Court of King's Bench, appeal side.

I rejected said motion, basing my judgment upon article 849 of the Criminal Code, now in force, which is to the following effect:—"Every one charged with being an accessory after the fact to any offence, or with having received any property, knowing it to have been stolen, may be indicted whether the principal offender or other party to the offence or persons for whom such property was so obtained, has or has not been indicted, etc."

I was of the opinion that the offence of receiving is not comprised in the offence of theft, and it was so held in the case of *Rex v. Lamoureux*, 21 C. L. T. 49; 4 Can. Crim. Cas. 101. •

Article 849 of the newly revised Statutes of Canada is the reproduction of article 627 of the former Criminal Code.

TASCHEREAU, C.J.:—The case is well stated in the remarks of Mr. Justice Curran upon the case reserved for this Court. Under the provisions of article 849 of the Criminal Code, R. S. C. 1906, as the learned Judge has properly so interpreted them, it is not necessary to indict the principal to a crime before proceeding with the trial of his accessory. The only thing the law requires, and it certainly exists in this case, is a close connection between the theft alleged and the party charged with receiving stolen goods proved to be those stolen. It is not absolutely necessary to set out in the indictment all the circumstances surrounding the theft. The majority of this Court is of opinion to dismiss the appeal and to confirm the verdict of the jury.

TRENHOLME and CROSS, JJ., dissenting, were of the opinion that it has to be proved that the accused had received the stolen money from the party who stole it, and the identity of the thief and his relationship with the accused must be proved. The verdict of the jury was improperly rendered on evidence which only went so far as to establish that some money was stolen, but the name or identity of the thief was not proved. Their Lordships were of opinion to quash the verdict.

QUEBEC.

SUPERIOR COURT.

JUNE 16TH, 1908.

WHELAN v. WHELAN ET AL.

*Will—Construction—Widow as Usufructuary — Substitution
—Deed—Validity.*

ARCHIBALD, J.:—The plaintiff and defendants are the children of the late Edward Whelan, and the plaintiff's action is en partage of the succession of the late Edward Whelan. Plaintiff alleges that Edward Whelan made his will on the 1st of May, 1885, instituting his wife usufructuary of all his property and his children owners in full property in equal shares; that at the time of his death, the testator left besides his wife, four children, namely:—William, Patrick, Helena and Thomas, but of these William died on the 14th February, 1905, before the bringing of this action; that Edward Whelan's wife died on the 25th May, 1907, without leaving a will; that Thomas Whelan, having died before his mother, the succession of Edward Whelan belonged in equal shares, after the mother's death, to the plaintiff and Patrick and Helena Whelan. Thereupon, plaintiff proceeds to say that by a notarial act passed on the 25th February, 1890, William Whelan had transferred to Robert Evans, the father of the mis en cause, all his rights and interests in a certain immovable property, belonging to the succession of the late Edward Whelan; that said Robert Evans is dead and his heir is the present mis en cause; that the said transfer was made without consideration and in error and is null inasmuch as it was the transfer of rights in a succession not yet opened and that it ought to be so declared, and plaintiff asks that the deed shall be set aside and that thereupon proceedings in partage of the said property shall be had between him and his co-heirs. The mis en cause pleaded substantially that the will of the late Edward Whelan created a substitution, although the word "usufructuary" was used to designate the rights of the widow; that the sale of the share of William Whelan in the property in question was for good and valid consideration and was legal and valid and conveyed the whole of the interests of the plaintiff in the said property; the mis en cause declaring that as to the plaintiff's action so far as it re-

garded the partage of the immovable property, *mis en cause* had no interests, and did not oppose the same, and the *mis en cause* prays that it be declared that the plaintiff had no right or interest in the immovable property. The defendant pleaded that no immovable property existed; that as to plaintiff's rights to the immovable, the same was the subject of an issue between the plaintiff and the *mis en cause*; that the plaintiff's action to set aside the deed in question was of a different nature than that of *partage* and that the plaintiff ought to have taken that action and have recovered judgment thereon before taking the action *en partage*, and defendant prays also for the dismissal of plaintiff's action as, at any rate, premature.

It becomes important, therefore, to determine whether the will of the late Edward Whelan created a substitution or only a usufruct, because if only a usufruct were created the sale by William Whelan to Robert Evans would convey only the rights which William had at that time, and Robert Evans being then alive, William's share would only be now one-fourth; whereas, if the will created a substitution, the death of Robert Evans before the opening of the substitution would have the effect of making the share of William Whelan one-third, instead of one-fourth.

The clause of the will upon which this question depends reads as follows: "I give, devise and bequeath unto my dearly beloved wife, Dame Anastasia Kirby, in usufruct, *en usufruit*, during her natural life-time (all his property), but from the moment of her death, or that she enters wedlock, the same to go in full property to my dearly beloved children, the living issue of my marriage with my said dearly beloved wife, the said Dame Anastasia Kirby, share and share alike.

"To have, hold, use and enjoy the said hereinbefore given, devised and bequeathed property and premises, in usufruct, *en usufruit*, as aforesaid, unto my dearly beloved wife, as long as she shall live, and from the moment of her death or that she again enters wedlock, the same shall go in full property, *en pleine propriete*, to my dearly beloved children then living, issue of my marriage with my dearly beloved wife, the said Dame Anastasia Kirby."

The testator uses the word usufruct repeatedly, as qualifying the right of his widow, and, doubtless, other things being equal, words ought to be interpreted in their natural sense. But the question after all is to determine whether

the children came into the property at the date of their father's death, subject only to the right of the wife to continue enjoyment until her death, or whether they only came into the property at all at the date of the death of their mother. There is one consideration which seems decisive that this latter view was the intention of the testator, because he said that the children living, not at the date of his death, but at the date of his widow's death, would be the children to succeed. That indicates that the property rights of the children were postponed to the death of the mother, so that if all those children had died previous to the mother, the provision would have become caduc, and the property would have gone to the mother's heirs. These are certain characteristics of a substitution, and I have no doubt that the provision in question has to be so interpreted.

William Whelan then conveys the whole share, which, by reason of the death of one of the children before the death of the mother, would have come to him if he had not conveyed it away.

With regard to the statement of the declaration, that the deed was made by error and without consideration, that was abandoned at the hearing, as abundant consideration was proved, but it is still contended that the deed is void as a sale of future rights of substitution.

It does not seem to me that it is necessary to do more than call attention to article 956 of the Civil Code:—"This substitute may, while the substitution lasts, dispose by act inter vivos or by will of his eventual right to the property of the substitution, subject to the contingency of its lapsing, and to its ulterior effects if it continue beyond him."

It is precisely what William Whelan did, and I can have no doubt that the deed in question did convey all the rights of William Whelan in the property in question.

As it otherwise appears upon the proof made by the defendant that there existed no movable property, there is evidently no basis for an action en partage and the plaintiff is wholly without right and without interest to take the present action. Action dismissed, with costs, upon the contestation of the *mis en cause* and upon that of the defendants.

QUEBEC.

SUPERIOR COURT.

JUNE 16TH, 1908.

BANNERMAN ET AL V. THE CONSUMERS' CORDAGE COMPANY.

Landlord and Tenant — Lease — Agreement by Tenant to Insure — Insolvency of Insurance Company — Warranty by Tenant of Solvency of Company—Liability.

ARCHIBALD, J.:—Plaintiffs sue defendant to recover the sum of \$1,875, alleging that on the 1st of October, 1890, the plaintiffs and Dame Mary Rose Gilboy, widow of the late Robert Bannerman, said Dame Gilboy, since deceased, leased to the defendant for a period of 21 years from the 15th of April, 1890, a rope factory, situated at Lachute, for the sum of \$7,500 per annum, payable quarterly; that plaintiffs are in the rights of Dame Gilboy; that on the 15th of January, 1907, there became due a quarterly instalment of the said rent, namely, the sum of \$1,875, which defendant neglects and refuses to pay, and the plaintiffs take action in consequence. Defendant in its plea admitted the lease and that the sum of \$1,875 due on January 1st last was not paid; but defendant declares that the lease in question contains the following clause:—"The said lessee hereby agrees to keep the leased premises, machinery and plant and buildings insured in solvent insurance companies, for the sum of \$22,000, during the continuance of this lease, and to transfer the policies of such insurances, together with the sum of such insurance, to the lessors and to exhibit to lessors or their agents, the policies of such insurances, and the receipts for the annual premiums, failing which the said lessors shall have the right to take such insurances and pay the premiums thereon and hold the lessee liable for the sum of money expended by them in so doing."

After citing the said clause of the lease the defendant alleges that before the 3rd of January instant, when the overdue instalments were due, the defendant, notwithstanding every effort, had been unable to insure said property in solvent insurance companies, because no company could be found which would take the risk; that Thomas Bannerman, acting for the plaintiffs, on the 3rd of January, presented himself at the defendant's office, in the absence of the gen-

eral manager, who was out of the city, and informed one of the defendant's employees that the plaintiffs had themselves insured the property for the sum of \$17,500 in the London Lloyds Underwriters, for the sum of \$2,500 in the Union Assurance Society of London, at a premium of 10 per cent., or \$2,000 for the whole, and demanded from the said employee the reimbursement of the said sum of \$2,000, as provided in the clause relating to insurance above cited; that the said employee then asked the plaintiffs to wait for the return of the defendant's general manager, but the plaintiffs refused. Whereupon said employee paid the sum of \$2,000, but only upon the promise, made by the said Bannerman, that when the defendant's manager returned, if the payment was not deemed satisfactory, it could be imputed upon the quarterly rent then falling due. The defendant further alleges that said insurances were not insurances in regular insurance companies, as contemplated by the contract between the parties, and the premiums charged upon said insurances were much greater than would have been charged by the regular insurance companies, and such premiums were not within the contemplation of the parties under the clause in question; that when the defendant's general manager returned, he repudiated said payment, but plaintiffs refused to carry out the understanding and agreement made in relation thereto. Defendant, therefore, contends that it was not bound to pay the insurance premium in question, and that compensation of the rent sued for by the plaintiffs was effected by that payment and the defendant prays for the dismissal of the action.

In virtue of a supplementary contract between the parties, to take the place of a provision of the lease above cited, relating to keeping the premises in question in proper condition, the defendant agreed to pay the sum of \$450 annually to the plaintiffs, payable quarterly at the same dates as the quarterly payments of rent, and there became due upon that sum a quarterly payment of \$112.50 on the said day of January, 1907, which sum plaintiffs had omitted to sue for in the principal action.

The whole case depends upon the right of defendant to be credited on account of rent for the said sum of \$2,000, which the plaintiffs received shortly before the due date of the rent, upon the demand of reimbursement for insurance premiums. The proof shows that it had been exceedingly difficult for the defendant to perform its obligation

relating to insuring the premises in question, and that in fact, that the property had been left for a considerable time without any insurance at all. This difficulty arose from the fact that the defendant was not occupying the property and that insurance companies have very great objections in taking risks upon silent factory property. The defendant had, on more than one occasion, notified the plaintiffs that it was unable to obtain insurances according to the terms of the contract, and calling upon the plaintiffs to exercise the right granted them by the contract and insure for themselves. Plaintiffs immediately did attempt to insure and found that none of the regular companies doing business in Montreal would take the risk upon the property remaining unoccupied. Finally the "Alliance Company of London," which was represented by the same agents as the "Lloyds Underwriters," agreed to take a risk of \$2,500, and succeeded in inducing the "Lloyds Underwriters" to carry for \$17,500. The "Lloyds Underwriters" is not a regular insurance company, but it issues policies which are considered in the business as absolutely safe. The only interest that the defendant could have in this matter is as to the rate of premiums. The intention of the parties by the clause in question was undoubtedly that the plaintiffs should be secure from loss in relation to the property in question. The defendant had no interest in that except that it would be liable for breach of contract to insure. But when the plaintiffs accepted the insurance company in question and demanded from the defendant the reimbursement of the premiums, it is plain that the defendant could not, in any way, be held towards the plaintiffs to warrant the solvency of the insurance company in question. The defendant's only interest in the matter is as to the rate of the premium. It appears proved in the case that if the property had been occupied as a factory, according to its destination, and according to the presumption which might arise from the lease between the parties, it would have been insurable at a premium of from 6 to 8 per cent. It is well known that where buildings or property, particularly manufacturing property, is not in operation, where it is insurable at all, the rate is considerably increased. There is no proof in this case that 10 per cent. was an extraordinary or extravagant premium for the insurance of the property in question.

As I have said before, the reason why the insurance companies would not take the risk upon the property was

because the factory was not running. That fact depended upon the will of the defendant; it was leased for a rope factory; the defendant was a rope manufacturer. It was nowhere expressly stated in the lease that its use for that purpose was to be discontinued, although such was probably the case. Either defendant intended to use and occupy the premises as a running factory or it did not. If it did, and subsequently ceased doing so, it would be surely held responsible for the consequences of its own act. If it never intended to occupy it as a rope factory, it must be presumed to have contracted, relating to insurance, to insure the unoccupied building. It could not be contended for a moment that because it could not find an insurance company who would take the risk that its obligation had become impossible and that it was therein relieved from it. Such an effect would only belong to absolute impossibility, such as might arise from circumstances related by the defendant. I have no hesitation in holding the defendant responsible towards the plaintiffs for the premium of insurance paid by the plaintiffs in this case. Besides this, the person in charge of the defendant's office, and who made the payment in question, was a person having authority to pay in the absence of the manager. He, himself, wrote out the receipt, which Thomas Bannerman signed for the plaintiffs, and it expresses that the payment is made for insurance premiums and he makes no mention whatever of any provision or conditions. Thomas Bannerman, under examination, denies absolutely that he promised or agreed directly or indirectly, as alleged in the plea.

On the whole, I am convinced that the plaintiffs must have judgment on the principal and incidental demand for the total sum of \$1,987.50, with interest and costs.

NEW BRUNSWICK.

FULL COURT.

APRIL 30TH, 1908.

REX v. KAY, EX PARTE ALLEN.

Public Health—C. S. N. B. 1903. c. 53—Notice to Remove Offensive Material—Misdescription of Premises—Jurisdiction of Magistrate.

A conviction against the defendant Geo. H. Allen under the Public Health Act (C. S. 1903, c. 53), for failing to re-

move material dangerous to the public health from premises indicated in a notice given by a health officer under section 36 of the Act, was brought before this Court on a rule absolute for certiorari and rule nisi to quash granted in Hilary term last, principally on the ground that as the premises described in the notice were not the premises of the defendant there was therefore no notice as required by the Act, and the magistrate had no jurisdiction. The defendant attended at the trial. He raised no objection to the wrong description nor was it contended he was misled by it; but the conviction was for failure to remove from the premises as described in the notice.

Argument on return of the rule nisi to quash took place on a former day in this term.

W. B. Chandler, K.C., showed cause.

W. W. Allen, K.C., contra.

The judgment of the Court (BARKER, C.J., HANINGTON, LANDRY, McLEOD, GREGORY, and WHITE, JJ.), was now delivered by

LANDRY, J.:—Sections 35 and 36 of "The Public Health Act" (Con. Stat. c. 53), read as follows:—

"35. The health officers in any district, or any one of them, may, in the day time, as often as they think necessary, enter into and upon any premises in the place for which they hold office, and examine such premises.

"36. If, upon such examination, they find that the premises are in a filthy or unclean state, or that any person or thing is there which, in their opinion, may endanger the public health, they or any two of them may order the proprietor or occupant to cleanse the same, and remove what is so found there."

Sub-section 4 of s. 32 gives an inspector appointed under the Act the same power as the health officers or any two of them. Section 63 imposes a penalty on any person who willfully disobeys or resists any lawful order of the inspector, or who refuses to comply with any by-law or order of the board of health.

The defendant was the owner of a piece of land at the corner of Church and Victoria streets in the city of Moncton. On this property was deposited ice which had been removed from the skating rink and it was proved at the trial that this ice was a menace to the public health. On the

8th day of April the defendant was served (by a copy of the same being left with his wife at his usual place of abode) with the following notice: "In accordance with instructions received from the local board of health for the city of Moncton, I do hereby order and require you to remove within three days from this date from the lot of land and premises owned by you and situate on the west side of Church street in the city of Moncton, at the corner of Church and Queen streets, the ice and rubbish now on said premises lately taken from the Victoria Rink building and placed on your lot, as the same in its present position endangers the public health." He did not remove the ice and rubbish, and on the twenty-fifth of April he was tried and convicted of having neglected or refused to comply with a lawful order made by Duncan S. Robertson, inspector of the board of health for the city of Moncton, and was adjudged to pay a fine of twenty-five dollars and costs. Several objections were urged as being fatal to the validity of the conviction. As I believe one of the grounds taken to be sufficient to make the conviction bad, there is no necessity of discussing the other grounds. In the notice to Mr. Allen, the defendant, it will be noticed that the description of the premises given is " . . . premises owned by you and situate on the west side of Church street in the city of Moncton, at the corner of Church and Queen streets." It is admitted that this description outside of the words "owned by you" designates clearly other premises than those of the defendant. On the trial the evidence established that the ice and rubbish complained of were not on the premises described, but were on lands of the defendant situate on the corner of Church and Victoria streets. It was contended that at the trial and before the trial, the defendant did not rely as a defence upon the defective description in the notice, but insisted he was not responsible because the débris spoken of had been put there by others than he, and by no authority or sanction of his; that though the description was incorrect the defendant was not misled, that he knew what premises were meant and that in fact the débris complained of was on his land. The defendant could not reasonably have believed that he was being proceeded against for refusing to remove rubbish injurious to the public health lying and being on premises not belonging to him. It must be concluded, I think, that he knew the proceedings were started to compel him to remove ice

and rubbish that were on his premises, and that after notice at any rate he became aware that such ice and rubbish were then on his land, and that the health officers considered that such ice remaining there was injurious to the public health. Notwithstanding that, I believe he had a right in law to insist on having all the requirements of the statute complied with for, if responsible, he was so by the statute carried out strictly before being convicted. In this case had he taken no heed of the notice or of the summons because of the incorrect description, no conviction could have been legally recorded against him for disobeying the order contained in that notice. If there is any semblance of reason for convicting him on the evidence it is because by his conduct after he received the notice and at the trial where he was present and defended, he waived the insufficiency of the description and convinced the magistrate that he was not misled by it and therefore his disobedience to the order of the inspector is as positive as if the description of his land had been properly set forth in the notice and summons. But I take it to give jurisdiction to the magistrate the proceedings must be based upon a lawful order, an order that could be enforced, given by the inspector to the defendant. Can this be said to be such an order? He is ordered to remove within three days, from a lot of land situate at the corner of Church and Queen streets. To make the defendant liable under the statute to obey this order he must be the owner or occupant of this lot on the corner of Church and Queen streets. It is admitted he is not; therefore he is not bound to take heed of this order at all. His taking heed of it by insisting that the objectionable matter was not on his land by any act of his or by his authority, cannot give jurisdiction if such jurisdiction did not exist already. Besides, taking the notice, the summons, the information and the conviction as they stand they show that the defendant is convicted for an offence in relation to property of which he is neither owner or occupant. The record, therefore, as it stands, is evidence which could not be made available as a defence to a prosecution properly instituted for disobeying a lawful order in relation to defendants' land on the corner of Church and Victoria streets for the same offence. For these reasons the rule should be made absolute.

NEW BRUNSWICK.

FULL COURT.

APRIL 30TH, 1908.

REX v. WATHEN, EX PARTE VANBUSKIRK.

Liquor License Act—Selling to Minor—Short Service of Summons—Non-appearance of Defendant—Conviction.

A conviction under section 67 of the Liquor License Act (C. S. 1903, c. 22), whereby the defendant Vanbuskirk was convicted before justice Wathen for selling liquor to a minor was brought before this Court on certiorari and order nisi to quash on grounds the same as stated in Rex v. Davis ex parte Vanbuskirk, reported ante p. 159; and on the additional ground that the summons was not served in time to give the defendant a reasonable opportunity to appear and make his defence. Argued in Michaelmas Term last.

W. B. Chandler, K.C., shews cause against the order nisi to quash.

C. L. Hanington, contra.

HANINGTON, J.:—The defendant Vanbuskirk was convicted before Mr. Wathen, a stipendiary magistrate for Kent county at Harcourt in that county, on the eleventh day of June last, for selling liquor contrary to the Liquor License Act, in penalty and costs; and this is a motion to quash that conviction on several grounds, the principal ones being that the summons was not served within a reasonable time and the Justice therefore had no jurisdiction, and also that the conviction is wrong in that it did not award imprisonment. An objection was also made against the amount allowed Mr. Irving, the license inspector who carried on the prosecution, and to whom a large counsel fee was taxed in his costs as attorney. As to the costs it appears that the statute allows the Justice to tax and allow counsel fees to the prosecutor, and therefore this Court, whatever their own opinion may be of the transaction, will not interfere.

I will not discuss the second point, as that is dealt with by His Honor Mr. Justice Landry in his judgment of the Court in the case of Rex v. Davis ex parte Vanbuskirk,

which declares the conviction bad on that ground and makes the rule absolute to quash it.

As to the insufficient service, the facts are that the summons was issued about ten o'clock in the forenoon of the day of the conviction and was returnable at one o'clock of the same day. The defendant did not appear, and it appears by the return that at the hour named for the hearing, the Justice opened his Court and then immediately adjourned it on the ground that he was required to give evidence before Mr. Davis's Court at that hour. The affidavits shew that the Justice Davis had issued a summons against Vanbuskirk for another offence which was being tried in the afternoon of the eleventh of June, before Davis, evidently in the same room in which the summons in this case was to be heard, and Justice Wathen was a witness before said Davis in said trial. That at the hour of one o'clock when the hearing in this matter was called, it does not appear that any affidavit or proof was made of the serving of the summons. The Justice's return is as follows.

"Summons issued June eleventh, A.D. 1907, returnable the same day at one o'clock in the afternoon.

"June 11th, 1907, one o'clock in the afternoon, Court opened, Robert A. Irving appears for the prosecution: The further hearing of this case postponed until three o'clock this afternoon as the presiding magistrate is required to give evidence before Mr. Davis's Court:

"June 11th, 1907, three o'clock in the afternoon, Court opened pursuant to adjournment; Mr. Robert A. Irving appears for the prosecution:

"Gilbert L. Keswick sworn, says: I am acting as constable for the county of Kent. I know Milledge Vanbuskirk; He is proprietor of the Eureka Hotel, in the parish of Harcourt in the county of Kent. It is the hotel where he lives: it is about one-quarter of a mile from here. I saw him, the accused, in Court a few minutes ago. He resides in the parish of Harcourt in the county of Kent, the same parish in which the magistrate resides and is now holding this Court." The paper marked "A" is produced in Court and shewn to constable, who says the signature to this paper, Leslie J. Wathen, is the handwriting of the presiding magistrate. "I gave Milledge Vanbuskirk, the accused in this matter, a duplicate copy of this summons in his hotel in the parish of Harcourt in the county of Kent by delivering the same to him personally. I wish to make a correction.

I am in error when I say I served a duplicate copy of paper marked 'A' on Milledge Vanbuskirk. It was a duplicate copy of paper marked "B," and I served it by delivering a true copy on him personally on his premises in the parish of Harcourt in the county of Kent (paper marked 'B' is initialed and received in evidence). The signature to this paper marked 'B,' Leslie J. Wathen, and is in the handwriting of Leslie J. Wathen, the presiding magistrate."

This is the whole record as to the subject of service of the summons.

The law, as well decided in the cases hereinafter referred to, is that there must be evidence before the Justice to shew that the defendant was served with the summons at a reasonable time before it was returnable; and unless that is shewn the Justice has no jurisdiction to hear the complaint, and it is on that principle the cases are determined by this Court. Under section 148 of the Canada Temperance Act (Rev. Stat. of Can. 1906 c. 152), the right of review of a judgment by certiorari, etc., is taken away; but this and other Courts hold that this section does not apply to convictions where the Justice has no jurisdiction, and the Chief Justice in *Reg v. Dibblee, In re Thompson*, 32 N. B. R. 242, at p. 244, affirms that principle and says if the service is insufficient and there is the absence of a preliminary proceeding which is necessary to give jurisdiction to the magistrate, the conviction is bad.

In the case now before us, the summons was issued at ten a.m., and returnable at one p.m., on the same day, and there was no evidence that it was served one hour or ten minutes before its return. In fact the evidence does not show that it was not served after the hour it was returnable. The Justice had no right to assume that it was served before its return, as the constable who served it did not until after the hour of its return prove any service, and his evidence as to that does not shew at what time it was served, and therefore the Justice had no reasonable grounds from the evidence, for finding—and there was no evidence on which he could find—it was served any reasonable or any time before its return, which is necessary before he has jurisdiction to act. It was argued before us that as the constable swore at the opening at three o'clock that he "saw the defendant there, (meaning in that room), a few minutes ago," that was evidence upon which the Justice could de-

termine that it was served a reasonable time. I think there is nothing in that contention for several reasons: First, it is too indefinite to prove any time of service; secondly, it is clear that the defendant was not there as appearing in this cause: and thirdly, because it is shewn and it is clear that the defendant was there at the time the constable speaks of attending in a Court then being held by another Justice for the trial of another cause and engaged in the defence of another complaint then being heard before such other Justice, and this case was not then going on in any Court, and Justice Wathen was then before such other Court as a witness, this case having been adjourned to a later hour.

In civil causes before such tribunals, the summons must be served six days on any defendant before the Justice can proceed to hear the parties, or if the defendant does not appear, proceed to hear *ex parte*. If there was any risk of the defendant not appearing on the reasonable service of summons in this matter, the law provides for a warrant and arrest in the first instance; so in my opinion service of a summons three hours—even had that been done—or a less time, before the hour fixed for the trial of a criminal charge should never be held to be a reasonable time of service, so as to enable the prosecution to proceed in the absence of the defendant without his consent. I am quite sure that generally such a limited time of service would not be held a reasonable service of any summons, and I cannot see why a different rule should be applied in cases under the Canada Temperance Act or the Liquor License Act, which never to my knowledge has been applied to any criminal proceedings even involving much less serious penalties. I cannot but fear, and I entertain the fear, that if a different principle is applied under these Acts than has been invariably applied so far as my experience goes to other cases, the result will not in the end be advantageous to the public interest nor permanently strengthen its appreciation of the administration of justice.

The law requires that a reasonable time has been given to the defendant to appear and defend, and proof must be given before the Justice that such has been given. If such proof is not given, the Justice has no more power or jurisdiction to proceed in the absence of the defendant, or of his consent, than if no summons had been issued at all. This is the result of the authorities as I read them. In *Reg. v.*

Dibblee, In re Thompson, this Court held that service on the twelfth of the month at four or five p.m. to appear on the thirteenth at eleven, was not sufficient. In that case the Chief Justice mentioned and disregarded the apparent holdings of the Court in *Ex parte Hopwood*, 15 Q. B. 121, and *In re Williams*, 21 L. J. N. S. M. C. 46, and followed the decision in *Reg. v. Smith*, L. R. 10 Q. B. 604. He says at page 245: "I prefer to follow the decision in *Reg. v. Smith*, rather than the earlier decisions to which I have referred," and Palmer, J., at page 246, says: "It is service on the person or at his place of residence that gives the magistrate jurisdiction to hear and determine the information, and he cannot give himself jurisdiction if the service is insufficient. A party summoned to answer a charge should have a fair and reasonable opportunity of putting in his defence. The evidence was not sufficient in either of these cases to enable a fair-minded man to come to the conclusion that the defendant had reasonable notice. Both rules should be made absolute." And King, J., says: "The case of *Reg. v. Smith* lays down a very proper rule in regard to the sufficiency of the service in cases like the present. I would refer particularly to the remarks of Mr. Justice Quain in that case."

In *Ex parte Hogan*, 32 N. B. R. 247, service at eight or nine p.m., for the next day at eleven a.m., was held insufficient; the Chief Justice in his judgment affirming the principle that the evidence must show that the summons was served at a reasonable time and unless it was so shewn the Justice could not proceed.

It was contended on the argument that the Justice alone was the one to determine as to whether or not the service was a reasonable one, and *In re Williams* and *Ex parte Hopwood* were referred to in support of that contention. It is enough here to say that our Court did not follow those cases, but adopted the principle laid down in *Reg. v. Smith*, which determines that while it may be within the power of the Justice to determine whether the service is reasonable or not, yet if the evidence on its face shews that it is not reasonable, the Superior Court will review it and set aside the conviction as it did there.

In *Reg. v. Mabee*, 17 O. R. 194, the principle applicable is discussed and adopted, whereby a short time of service is disapproved of, the Court there holding that under section 39 of *Rev. Stat. Can. c. 178*, there must be evidence

before the magistrate that a reasonable time has elapsed between the service of the summons and the day appointed for the hearing to give the magistrate jurisdiction.

I think there was no sufficient evidence upon which, adopting the words of Palmer, J., a fair-minded man would be enabled to come to the conclusion that the summons was served a reasonable time before the time appointed for the hearing. The Justice had no jurisdiction to proceed, and the conviction is bad and should be quashed.

LANDRY, J.—There were several points in this case, including the point that the conviction was bad because it did not order imprisonment in default of sufficient distress. For the reasons given in the judgment in the case of *The King v. Davis ex parte Vanbuskirk* on this point we think the order should be absolute to quash the conviction.

BARKER, C.J., McLEOD and GREGORY, JJ., agreed with LANDRY, J.

Rule absolute to quash the conviction.

NOVA SCOTIA.

MEAGHER, J., AT CHAMBERS.

JULY 18TH, 1908.

HALL v. THE QUEEN INSURANCE CO.

Debtor and Creditor—Fund in Court—Insurance Policy—Assignment—Re-assignment—Distribution — Control of Fund.

Application by creditors of the plaintiff for the distribution of a fund paid into Court under a judgment recovered against the defendant company.

V. J. Paton, K.C., and T. R. Robertson, for different claimants.

MEAGHER, J.:—The money paid into Court, under the order for judgment, represents a claim for loss under a policy

of insurance issued by the defendants to J. H. Hall, the original plaintiff. Gage & Co. and W. A. Hall were added as plaintiffs on the trial; the former because of an assignment to him by the insured, and the latter because of a later assignment to him from Gage & Co.

There are a number of rival claimants for the fund. The insured made the following assignments under the Collection Act and in the order of their enumeration herein:— To the Bank of Commerce, February 27th, 1904; to McKinlay & Co., March 21st, 1904; Nerlich & Co., on the same date as that to McKinlay and to Atkinson Bros., April 26th, 1904. Notice of each of these was given promptly to the defendants.

The Bank, on December 17th, 1904, re-assigned their claim under the assignment to it to the insured by an ordinary transfer not under the Collection Act. The defendants had prompt notice of this re-assignment. The insured on January 5th, 1906, made an assignment to Gage & Co. already referred to, and on May 14th, 1908, he made another assignment to the bank; both were under the Collection Act. Gage & Co. by an ordinary transfer assigned their claim to the fund to H. A. Hall in October, 1907. All the above transfers had reference to the claim for loss by the insured under the policy. The defendants when called upon by the bank to settle the claim for loss, refused to pay more than \$792, which the bank would have accepted, but for the request of the insured that it should re-assign its claim upon the defendants to him so as to enable him to sue for the entire loss. The bank agreed to do so subject to this, that the insured should give it an undertaking that he would after he commenced the action to recover the loss, assign to the bank \$792, to be paid out of the moneys recovered in the action. This was agreed to and was formally done accordingly. The insured's solicitor, under his client's directions, also undertook in writing to pay that sum to the bank out of moneys recovered in the action. It was contended that this displaced the bank's entire claim to the fund, and gave the assignees subsequent to the assignment to the bank, priority over it. I am unable to accept this contention. The arrangement just mentioned preserved to the bank the right to \$792 at least as a first claim upon the fund.

The re-assignment and the bargain as to the \$792 were coincident and formed but one transaction and should be

so regarded. The true intent of that bargain must be applied, and from it it is evident the bank intended to retain a claim upon the fund to the amount mentioned, and to make, and did make, the insured a trustee for it. To that extent at least, even after the re-assignment, it possessed an equity to that sum which attached to the money in question and would follow it no matter how many times the insured might transfer it thereafter. The bank's right to recover the whole loss and thereout to retain enough to satisfy its judgment, was undoubted up to the moment the re-assignment was executed; its right to the balance will be discussed later. The circumstances under, or purposes for, which the bank re-assigned to the insured were not disclosed upon the first trial of this action. I then held, and there is nothing in the opinion of the full Court to militate against these views, viz., that the assignment to the bank and the notice to the defendants vested in the bank, speaking generally, the exclusive right to sue for and recover the loss; that McKinlay & Co., who held the second assignment, merely stood in the shoes of the insured and possessed no greater right than that of compelling an accounting by the bank, and finally that the re-assignment to the insured vested in him the title and rights of action the bank then held. I was not then discussing the point which arose in *McCurdy v. McRae*, 23 N. S. R. 40, but merely the right of action of the insured under the bank's assignment to him. According to the opinion of the Court in *Farlinger v. Ingraham*, 38 N. S. R. 476, the bank's position was this: it held the absolute title to the insurance money to satisfy, first, its own claim and the balance, if any, in trust for those beneficially entitled thereto.

I must therefore regard the bank as a trustee in respect to the latter, and liable to account to them at least up to the time when it assigned its claim to the insured. For present purposes it is not necessary to determine whether such liability continued afterwards or not. Assuming, however, for the sake of argument, that the bank could by a transfer terminate its liability to account, the insured necessarily took the title the bank held and nothing more, and took it subject to all the equities attaching to it in the bank's hands. So much appears clear from section 19, sub-section 5, of the Judicature Act, and apart from that by operation of the principle applied in *Union Bank v. Dickie*, which followed *Mangles v. Dixon* in the House of Lords and many English

cases, McKinlay & Co., Nerlich & Co., and Atkinson Bros., had acquired rights against this fund in the hands of the bank before the bank re-assigned it; these continued unimpaired notwithstanding the assignment by the bank to the insured, and no subsequent act or transfer of the insured could affect or displace them; neither could any subsequent legal proceeding which was shewn to have been taken, prejudice or extinguish them.

The mere right of action to recover the loss in a case like the present is not necessarily the test for determining the right to retain it for the use of the party recovering, or for the use of the bank beyond the \$792, or for Gage & Co., or their assignee, W. A. Hall. I am strongly of opinion that the assignment by the bank to the insured gave him no power or control over the fund so as to enable him to give priority to Gage & Co., or any one else, over those who obtained assignments subsequent to the first one to the bank, but prior to the re-assignment to him.

It remains to consider whether the bank has done anything which limits its claim in the first instance to the sum of \$792.

It was contended that McKinlay & Co. could not by reason of any of the events or acts subsequent to their assignment acquire a greater right than the insured had upon the fund when he assigned to them, which was to receive the surplus after the bank's claim was paid; and that some one was entitled to receive the amount due on the bank's judgment before McKinlays received anything. The answer depends not upon the effect of anything done by the insured, but upon the things done by the bank itself.

The bank could abandon or destroy its own claim wholly or in part, independently of the insured.

The bank after the re-assignment could not claim from Hall out of the fund more than \$792; he then held the entire title subject to the equities which properly attached to the fund when it vested in him by the bank's transfer. The bank by the re-assignment parted with all its title to the fund, but retained through the insured the right to receive a portion only of what was due upon their judgment out of the chose in action in question, the effect of which was to displace their lien upon the moneys in respect to the balance of their judgment, and once they did that McKinlay & Co. and the other assignees who become such prior to the re-assign-

ment, became entitled in the order of their priority to rank next after the payment of the \$792. The judgment of the bank beyond that sum, so far as it may be effective, after what has been done, still remains; the bank has done nothing, I assume, to impair or destroy it, although its claim upon the fund beyond the \$792 has been destroyed. The bank was willing to accept \$792 from the defendants in satisfaction of their claim upon the moneys arising from the loss under the policy. The bargain made with the insured showed a continuation of their willingness in that particular and their intention to make no further claim upon the fund.

The right to interest was not discussed, but it may be together with the dispositions of the costs when the order is moved, which may be done at any time notwithstanding vacation, upon giving me a few days notice of the time fixed or agreed upon by those interested.

NEW BRUNSWICK.

SUPREME COURT IN EQUITY.

JULY 14TH, 1908.

EARLE, TRUSTEE, ETC., OF LAWTON v. LAWTON
ET AL.

Will—Construction—Fund for Heirs—Period of Distribution—Determination of Class—Discretion of Trustees.

W. A. Ewing, for the plaintiff.

A. W. Macrae, J. Roy Campbell and K. J. Macrae, for defendants.

BARKER, C.J.:—Charles Lawton died at St. John on the 11th February, 1899, leaving a will dated February 28th, 1898, by which he appointed the present plaintiff and the late L. J. Almon executors and trustees of the estate. He disposed of his property as follows: "I give, devise and bequeath unto my executors, hereinafter named, their heirs, executors and administrators, all my real and personal estate, whatsoever and wheresoever situate, upon trust, to pay all my just debts and funeral and testamentary expenses, to pay

from time to time, so much of the income of my said estate as they, in their discretion, shall see fit, towards the support, maintenance and education of the children of my nephews James Clark Lawton and Charles Abbott Lawton, until they shall respectively arrive at the age of twenty-one years, and on each child attaining the age of twenty-five years, to pay to such child what they consider would be his or her share in my said estate, dividing the same equally between such children living, and the children of any deceased child when such payment shall be made, such payment to be per stirpes, and not per capita, and the children of any deceased child being entitled to the share of their father or mother as the case may be, and their respective share or shares being transferred to their respective guardians." At the time of Charles Lawton's death his nephew James Clark Lawton had three children living — Eliza Edna, Benjamin and Richard Woofendale. His nephew Charles Abbott Lawton at the same time had four children living—Alice, William Parker, Charles Ralph and Herbert Clarence. All of these seven children were then under age, and there were no children of a deceased child in either family. Charles Ralph Lawton died March 23rd, 1904, without ever having been married. On the 19th February, 1906, some seven years after the testator's death, another child—the defendant Vandyke Lawton—was born to James Clarke Lawton. Alice Lawton attained the age of 25 years on the 29th January, 1908, and has therefore become entitled to be paid what the trustees consider her share in the terms of the will. In determining that two questions have arisen, and are now stated for the opinion of this Court. First, is the property to be divided into two equal parts and one half to be distributed among the children of the one nephew, and the other among the children of the other nephew; or is the whole property to be divided equally among the children of both? And second, is Vandyke Lawton entitled to a share, he having been born after the testator's death but before Alice Lawton attained the age of 25 years, she having been the first of the children to reach that age? I think the intention of the testator as clearly indicated by the will was to benefit all the children of his two nephews alike—first, by giving them all, during their minority, an equal right to such amount as the trustees might, in their discretion, think proper for their support, maintenance and educa-

tion; and in the second place by making an equal division of the corpus among the children of both families. There is nothing in the will that I can see to suggest or to warrant any different construction. Although the other children are not entitled to be paid their shares, a present basis of distribution must be determined in order to enable the trustees to fix the amount coming to Alice Lawton, and for that reason it is necessary to ascertain whether Vandyke Lawton is a beneficiary and entitled to a share equally with his brothers and sisters living at the time the testator died. The general rule as laid down in Hawkins on Wills, 75, and other books of authority is, that in the absence of a contrary intention appearing on the face of the will itself, the time for ascertaining the class is the period when the first of the class, by attaining the specified age, becomes entitled to receive his share, and those who come into esse after that time are excluded: *Andrews v. Partington*, 3 Brown, Ch. C. 401; *In re Emmetts Estate*, L. R. 13 Ch. D. 484.

This is said to be a rule of convenience in reference to which Jessel, M.R., in the case just cited says: "There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied when it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable:" *Berkeley v. Swinburne*, 16 Sim. 275; *In re Wenmoth's Estate*, L. R. 37 Ch. D. 266.

The words in the will itself are certainly not happily selected, and their meaning is not free from doubt, but I should read them as fixing the time of payment of the first share as the time for determining those entitled to shares, and that such persons were the children then living and the children of a deceased child who were to take per stirpes and not per capita. I cannot give any other reasonable meaning to the words "when such payment shall be made."

I shall therefore hold that Vandyke Lawton is entitled to share as one of the nephew's children, and there will be a declaration accordingly.

The only point mentioned at the argument was as to an increased allowance for the support and education of some of the infant children. If the fund is to remain in the hands of the trustees the testator has placed the amount of the income to be used for the support and education of the infants entirely in their discretion, and it is not usual for this Court to interfere with such discretion in the absence of bad faith: *Gisborne v. Gisborne*, L. R. 2 A. C. 300.

There is a large sum to the credit of income in the hands of the trustee available for such purposes. I have no evidence before me bearing on the question and therefore nothing on which to proceed if it were a matter with which this Court would at present interfere.

Declaration as to Vandyke Lawton with leave reserved to apply for further directions.

PRINCE EDWARD ISLAND.

SUPREME COURT.

AUGUST 6TH, 1908.

McLEAN v. INGS.

*Trespass and Trover—Verdict for Plaintiff for \$1.60—Costs
—Certificate against—Common Law Procedure Act, 1873,
sec. 312.*

J. J. Johnston, for plaintiff.

W. S. Stewart, K.C., for defendant.

FITZGERALD, J.:—This was a suit brought to recover \$100 damages by reason of the taking by the defendant of some seaweed, the property of the plaintiff.

The declaration contains two counts, one in trespass, the other in trover.

To these severally, the defendant pleaded not guilty, and that the goods were not the plaintiff's as alleged.

The jury found a verdict for the plaintiff for \$1.60, being the price of two loads of seaweed taken by defendant.

I am asked to certify against costs under sec. 312 of the C. L. P. Act.

Wright v. Hale, 30 L. J. Ex. 4 (6 H. & N. 227), Saunders v. Kirwan, 10 C. B. N. S. 514, 30 L. J. C. p. 351; Gooding v. Britnall, 31 L. J. C. P. 5; Danby v. Lamb, 11 C. B. N. S. 423; 3 L. J. C. P. 17, and the case of Robinson v. Nelson, decided by Mr. Justice Peters in 1880, 2 H. & W. 318, are the only cases I can find reported having reference to this section (a copy of sec. 34 of the Imperial C. L. P. Act of 1860, 23 & 24 Vict. c. 126).

These authorities shew that it is a matter in which the Judge must exercise his own discretion; but that the statute gives power to the Judge to deprive the plaintiff of costs, provided only he negatives all the three things mentioned in the section, not one or two of them.

The Judge must, therefore, certify that this action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which it was brought was not both wilful and malicious: Saunders v. Kirwan; and that it (this action) was not fit to be brought, before the plaintiff can be deprived of his costs: Gooding v. Britnall.

After some consideration, I have decided to certify against costs, as clearly it was an action for damages only, though the title to the property taken was in dispute,—no question as to the right of taking seaweed on the foreshore or elsewhere being involved; and I cannot say that the taking of this seaweed was wilful and malicious, though it may have been wilful. Eliminating these two elements, it does not appear to me that a suit in which I charged the jury that the value of the seaweed taken, according to the evidence, could not exceed some seven or eight dollars; and an intelligent jury found that only two loads of seaweed, the property of the plaintiff, had been taken by the defendant, of the value of one dollar and sixty cents, is a fit suit to be brought in this Court.

I have therefore made the certificate on the record as required by the Act certifying against costs.

PRINCE EDWARD ISLAND.

COURT OF CHANCERY.

AUGUST 6TH, 1908.

W. F. H. CARVELL v. W. H. AITKEN, F. P. CARVELL
AND J. A. MESSERVY.

*Executors and Trustees — Partners — Assets Employed in
Trade—Action by Cestui que Trust for Account of Pro-
fits—Debt not Called in by Executor—Payment of In-
terest—Election—Acquiescence.*

Neil McQuarrie, K.C., for complainant.

F. L. Haszard, K.C., D. C. McLeod, K.C., and W. E.
Bentley, for defendant W. H. Aitken.

W. A. O. Morson, K.C., for defendant F. P. Carvell.

A. B. Warburton, K.C., for defendant J. A. Messervy.

FITZGERALD, V.C.:—Shortly, this bill is filed asking that the profits of the firm of Carvell Bros. on fifty-two thousand dollars held by them for the estate of the late J. S. Carvell be accounted for to the complainant, between the years 1898 and 1905.

This sum of \$52,000 was the amount for which the late J. S. Carvell sold his interest in the firm to his co-partners.

In an agreement dated the third day of June, 1893, the terms of such sale are set forth, viz., that the said J. S. Carvell agreed to allow the said sum to remain in the hands of the new firm then constituted on his withdrawal, for a period of five years at seven per cent.

It being further agreed that in the event of the dissolution of the firm before such five years then the said J. S. Carvell, his executors or administrators, should be entitled to payment on such dissolution.

This agreement was signed as well by J. S. Carvell as by all the remaining members of the firm, then consisting of Louis Carvell, W. H. Aitken, F. P. Carvell and J. A. Messervy.

In the following year J. S. Carvell died, and by his will appointed two of the defendants, W. H. Aitken and F. P. Carvell (testator's son), both then continuing members of the firm of Carvell Bros., trustees and executors of his will,

along with his other son, W. F. H. Carvell (the complainant here), but not a member of the firm.

The will, referring to this money as "money belonging to me now held by or owing to me from the firm of Carvell Bros.," devised it with all testator's residuary, real and personal property, to the said W. F. H. Carvell, F. P. Carvell and W. H. Aitken upon certain trusts to sell, call in and convert the same into money, and for the investment and payment out thereof (the said W. F. H. Carvell and F. P. Carvell being present beneficiaries of a part thereof, and residuary legatees of the whole thereof), provision being contained therein that notwithstanding the dissolution mentioned in the agreement, if the business be continued by a new firm of which W. H. Aitken and testator's son, F. P. Carvell, should be members, then the trustees might continue the said fifty-two thousand dollars, or any part thereof, in the firm until the 1st February, 1898, and a further provision relieving the trustees from all liability by reason of the money remaining in such business and from all accountability for profits in the business by those trustees who were also members of the firm.

The fund remained in the firm until its dissolution on the 31st January, 1905, and interest was duly paid yearly to the estate of seven per cent. until 1901, and at six per cent. after that date.

On the twentieth day of April, 1905, an order of the Court of Chancery appointed J. A. Messervy a trustee in the place of W. H. Aitken resigned, and on the twenty-eighth day of the same month W. H. Aitken, F. P. Carvell, and W. F. H. Carvell paid over the fund and accrued interest then due to the then trustees, F. P. Carvell, W. F. H. Carvell and J. A. Messervy, and receipts and releases under seal were then executed by such former trustees to the firm of Carvell Bros., and by such latter trustees to their predecessors for the amount of such fund, viz., \$52,000.

We have here therefore a sale by the chief partner in a prosperous firm of his interest therein for a specified sum to the remaining partners with a time fixed for payment; thereafter death of such chief partner and the appointment of two of these partners trustees and executors, with defined trusts in relation to such money; an evident intent and desire of all parties to preserve the partnership business; a failure on the part of the trustees to enforce payment of such purchase

money when due, and a yearly payment of interest by the firm to the trustees so long as it remained unpaid.

Under such circumstances can the complainant now ask for an account of the profits of the firm within the time mentioned, with a view of participating in them, or so much thereof as were earned by the \$52,000?

I am of opinion that he cannot; and that the relation between the trustees and surviving partners being that of creditors and debtors in relation to a debt created by the testator himself, and by whose subsequent will some of the parties to this debt were made trustees of his estate, is not such as brings them (the trustees) within the rule that trustees cannot without breach of trust sell out, or call in trust moneys, and embark them in any trade or speculation, and without being answerable for all profits made by reason of such breach.

In *Vyse v. Foster*, L. R. 8 Ch. 309 and 7 H. L. 318, the Court had before it a contract of sale of the interest in the business of a deceased partner by those partners who might survive him. "A clear and absolute contract for purchase," as Lord Chancellor Cairns terms it, complete and binding on all the parties, whereby such surviving partners became mere debtors (one of them being an executor of the deceased partner) to the testator's estate for the purchase money. A contract in which, as Lord Selborne puts it, there existed the relation of debtor and creditor as fully with respect to the one partner who was executor, as with the others who were not, "a debt due from an executor and strangers to the executorship under a contract made by the testator himself," with an appointed time for payment, bearing five per cent. interest.

The sole question in that case was, "Did the delay in calling in this debt due to the testator from a firm of which some of the executors were members give a devisee of such deceased partner a right to share in the profits of the business, the will of such deceased partner directing a different disposition of this debt?"

When the case was before the Lords Justices of Appeal, Lord Justice James, in giving the judgment of the Court, said: "We are not able to concur with the Vice-Chancellor in thinking that this case is governed by any of the familiar cases to which he has referred. We have found no case at all similar to it. It is not the case of a trustee committing

a direct and positive breach of trust by selling out or calling in trust moneys for the purpose of embarking them, or by actually embarking trust moneys in his hands in any trade or speculation. It is merely the case of a body of executors not calling in from a body of traders, there being a common member of both bodies, that which was a legal debt to the testator and which was, by the operation of the will, converted into an equitable debt, but still a debt to his estate.

"Is the mere fact of the union of the three characters—debtor, executor and trader—in the same person sufficient to entitle the estate to an investigation into the trader's own business because there has been some delay or great delay in paying off the debt? We have found no case in which this has been laid down, even in the case of a sole executor, sole debtor, sole trader. There have been hundreds, probably thousands, of cases in which traders have been executors and in which, on taking their accounts, balances, and large balances, have been found due from them; but in no case, so far as we are aware, has it ever been held that where there has been no active breach of trust in the getting or in selling out trust assets, but where there has been a mere balance on the account of receipts—legitimate receipts—and payments, the omission to invest the balance has made the executor liable to account for the profits of his own trade. But this case is far stronger than the case we have suggested; and if the rule as to profits were to apply to it, it would be difficult, if not impossible, to exclude from its application cases where it would shock the common feelings of mankind."

I would also quote his words concluding his judgment:—"The debtors were a solvent and most prosperous firm; the money of the plaintiff was left outstanding, just as the trustees left their own accumulated savings to an immense amount, on the same security and the same terms; and we are satisfied that the trustees acted in the most perfect good faith and in the well warranted belief that, in omitting to call in the plaintiff's money, they were doing what she, if she were of full age, would have been only too glad that she should do."

And the Court held that under such circumstances the technical breach of trust of allowing trust money due and payable to remain outstanding on the personal security of persons engaged in trade, some of the executors being en-

gaged in such trade as partners, and having the use of the money so left, did not give the complainant a right to share in the profits of such trade or business.

This judgment was upheld on appeal in the House of Lords. But it is contended that the grounds of their Lordship's decision makes this almost parallel case with the one before me not applicable here.

Lord Selborne, as I understand the judgment of that House, sums up the ground of its decision in the following language:—

“The question, therefore, really is whether from mere delay under the circumstances of this case, in the payment of the debt, your Lordships can infer a new contract of forbearance equivalent to an agreement to lend the money *de novo*, as if it had been paid to the executors and then lent back again.

“I quite agree with what has been said by my noble and learned friend on the woolsack, that from mere delay in payment under the circumstances of such a joint debt as this, due from an executor and strangers to the executorship under a contract made by the testator himself, you ought not to draw any such inference.”

I see no further distinction than this between the two judgments, one, that there being a technical breach of trust, the mere fact of delay in calling in a debt existing under such a contract, did not render an executor liable to account for the profits of his own trade; the other, that time was not the essence of such a contract with its manifest intent that the partner's share was taken for the purpose of continuing the business of the surviving partners, and that mere delay in payment did not infer such a dealing *de novo* with the funds as would bring it within the principles enunciated in *Piety v. Stace*, 4 Ves. 620 or, *Docker v. Somes*, 2 My. & K. 655, and so entitle the complainant to profits.

There appears to me no difference in principle. Both are governed by the fact that there existed a contract made by the testator, as opposed to a dealing by the executor himself with the moneys held in trust by him; which is the like crucial feature in the case before me.

But supposing a difference—the reasons given by the Lord Justices in appeal so closely apply here that I need not again refer to them; and the reasons given in the House

of Lords must as clearly be applicable, for there can be no doubt as to the similarity of the contract there and the contract here, and that the will there and the will here order a different disposition of the funds, and that there is the like position of the parties in relation to the trust fund, and that equally here, as there, the sale by the chief partner in the business was made to his surviving or remaining partners that the business might be preserved.

In the words of the Lord Chancellor, I can say here as he said in that case, that I think it is a just inference from the evidence in this case that it was highly convenient for the remaining partners that this payment should not have been made at the time stipulated, and that I cannot but draw the conclusion from the facts that it was also for the real interest of all the cestuis que trustent that payment should not be forced at the day actually stipulated for.

I have no hesitation in holding that the same delay in payment here gives the complainant no right to share in the profits of Carvell Brothers.

I have little more to add. It is admitted that the interest paid was fair and reasonable, larger probably than could have safely been obtained between the years 1898 and 1905. I refer now to the charge in the bill which states that W. H. Aitken, F. P. Carvell and J. A. Messervy by pretence and collusion retained in the hands of Carvell Bros. out of said trust funds \$5,300, and appropriated it towards an alleged claim of Carvell Bros. against the complainant, without his consent, etc.

That is a question of fact, and upon which the complainant should leave the Court in no doubt, before asking for a finding thereon. I need only say that there has been no evidence given before me which would justify me in finding such a charge to be true.

I have not referred to the many other points raised in this case, among others, the concurrence of the parties, and the releases and discharges executed under seal; for though I do not conceive that either F. P. Carvell or the complainant W. F. H. Carvell, after their actual acquiescence and concurrence, as two of the three trustees of their father's estate, in extending the time for payment under the agreement of the 3rd of June, 1893, could now be otherwise than estopped in complaining of such a breach of trust, more especially after payment and receipt in full of the fund and of the

interest thereon from the year 1893 until the year 1905, and the dissolution of the firm and the settlement with and payment of the several interests in the partnership to its retiring members (among them being F. P. Carvell) on the basis of such a dealing with the fund: *Chillingworth v. Chambers*, 1896, 1 Ch. 685; *Powell v. Hulkes*, 33 Ch. Div. 552, as I do not think it necessary to go fully into that branch of the case.

It would be difficult, I think, to suggest a case where failure to apply such an unquestionable equitable estoppel would in the language of L. J. James "more shock the common feelings of mankind."

The bill will be dismissed with costs.

PRINCE EDWARD ISLAND.

COURT OF CHANCERY.

AUGUST 6TH, 1908.

HUESTIS AND OTHERS v. DURANT AND OTHERS.

Partition of Land—Disputed Title—Bona Fides of Defendant's Claim of Title—Condition in Will — Forfeiture—Jurisdiction of Court of Chancery to Find as to Title.

D. C. McLeod, K.C., and W. E. Bentley, for complainant.
Neil McQuarrie, K.C., for defendant Durant.

FITZGERALD, V.C.:—We are here proceeding under the authority of the Court of Equity to decree a partition among those interested in certain lands and premises, a jurisdiction not created by the Stat. 59 Vic. cap. 7, which only gives to the Court power to sell and distribute the proceeds when such distribution would be more beneficial to the parties interested than a division of the property, but inherent in the Court under its general authority.

In every suit for partition the complainants must prove their title to the undivided part of the property they seek to have divided, and the question has occasionally arisen, when either there has been failure of such proof, or there is a contestation of title, what course should the Court pursue. I speak, of course, without reference to Lord

Rolls' Act (25 & 26 Vic. c. 42), for that statute has not been enacted here. A short review of some of these cases will, I think, assist in coming to a conclusion as to when this Court will determine the question of title, and when it will send the parties to a Court of Common Law to have it determined there.

In the Bishop of Ely v. Kenrick, Bunbury 322, decided in 1732, it was intimated that a Court of Equity would not grant a commission to set forth lands, the particulars of which the plaintiff did not know, and defendant denied that he had any lands in possession belonging to the plaintiff.

In Cartwright v. Pultney, 2 Atk. 380, decided some ten years afterwards, Lord Chancellor Hardwicke said, giving it as a reason that the plaintiff must shew a title in himself, "Here the reason is because conveyances are directed and not a partition only, which make it discretionary in this Court, where plaintiff has a legal title, they will grant a partition or not: and when there are suspicious circumstances in the plaintiff's title, the Court will leave him to law."

And on a supplemental bill filed setting forth a title free from such suspicions, time was given plaintiff to make out such title.

In Parker v. Gerard, Ambler p. 236, on a bill in 1754 for partition in the Rolls Court, the Master of the Rolls said that such a bill was a matter of right, and there was no instance in not succeeding on it, but where there is not proof of title in plaintiff—citing with approval the above case of Cartwright v. Pultney, where Court gave leave and time for plaintiff to make out his title.

In Agar v. Fairfax, 17 Ves. 533, decided in 1810 on appeal from the Rolls Court, the Lord Chancellor, after referring to partition at common law, said: "That is attended with so much difficulty that by analogy to the jurisdiction of a Court of Equity in the case of dower, a partition may be obtained by bill. The plaintiff must however state upon the record his own title and the titles of the defendants: and with the view to enable the plaintiff to obtain a judgment for partition the Court will direct inquiries to ascertain who are together with him entitled to the whole subject."

In Barring v. Nash, 1 Ves. & Beames 551, decided some three years afterwards on a bill for partition, it was held by the Vice-Chancellor that Courts of Equity have concur-

rent jurisdiction with Courts of Law, more convenient where the interest is much divided, and that though, if the plaintiff's title is clear, he may demand a commission as a matter of right, yet if his title is suspicious the Court may exercise its discretion and leave him to his remedy at law.

Potter v. Waller, 2 De Gex & S. 410, decided in 1848, was a suit originally purporting to be a suit for partition, afterwards amended by adding an alternative prayer for a declaration that the plaintiff was entitled to the moiety claimed by the defendant, and afterwards re-amended—omitting the prayer for a partition. In it the only question decided was that defendants were bound to answer on discovery whether they had made certain alleged representations as to their title.

Its only applicability here rests on the remark of the Vice-Chancellor, when it was urged that the plaintiff was entitled to have an inquiry as to the defendant's interest, who is reported to have said:—

“Not as a matter of course, I have heard two Judges at least say that a bill for partition cannot be made the means of trying a disputed title.”

From the amendments made it would appear that partition was not the real object of the bill in that case. In *Bolton v. Bolton*, decided in 1868, and as cited in a foot note in L. R. 7 Eq. 298, Vice-Chancellor Stuart held, as the plaintiff claimed under one will, and the contesting defendant under another, to retain the bill in his Court for a year with liberty to the plaintiff to bring his action. The Court of Appeal sustained that finding on the ground that the defendant was in possession; remarking, that they would give the case much more consideration if the plaintiff and defendant were claiming under the same instrument, and there was nothing to be decided between them but a question upon its construction.

In *Slade v. Barlow*, reported in the same volume of the Law Reports, p. 296, the V. C. followed *Bolton v. Bolton*, seeing that the real object of the suit was to recover possession under a legal title.

In *Giffard v. Williams*, L. R. 8 Eq. 494, decided in 1869, V. C. Stewart held that the bill being primarily and mainly for partition, and there being no rule that a bill for partition cannot be maintained if the defendant denies the title, and

the title is purely legal, he would consider the question of title raised and did so, finding that the plaintiffs had proved their title clearly.

On appeal, L. R. 5 Ch. 546, Lord Hatherley reversed that decision, saying that it would not be proper for the Court under colour of making a decree for partition, in fact to decide the legal right to this land; and he further found that the evidence was not in their Lordships' opinion conclusive, and should be decided by a jury.

From these cases it is not easy to say with confidence when this Court will exercise its jurisdiction (for that cannot be doubted) in determining the question of title when it arises in a partition suit.

It will be conceded however that the question of title being necessarily before the Court in every partition suit, it will exercise its concurrent jurisdiction with the Common Law Courts, in deciding such question when it is incidental to the partition sought to be made before it; indeed it must do so, that a perfect title may be given to those entitled on a division or to the purchaser on a sale. Further, that it will hold its hand and leave the parties to their common law action when the real purpose disclosed is not partition but adjudication of disputed title.

Between these two admitted positions I take it that the authorities I have quoted would indicate that when possession is not out of the plaintiff and when it is a question of construction merely, both parties claiming under the same instrument, the Court will to avoid multiplicity of suits determine the question of title itself under its concurrent jurisdiction.

I fail to see how it can do otherwise, if it is to determine on the bona fides of the defendant's contention of title, which it assuredly must do in some cases.

This leads me to consider the facts in this case as I gathered them on the argument of counsel, and from the type-written copy of the evidence which it was agreed I should consider as taken before me.

The facts are not materially in dispute.

The bill was filed on the 9th day of October, 1906, and I heard the argument on the 24th April last.

W. B. Tuplin died in 1874 possessed of a leasehold interest for a term of 999 years in 60 acres of land at Margate.

By his will, dated the 8th November, 1872, he devised this land to his grandson, John Torr Tuplin, and to his mother, Mary Tuplin, widow of his son John Tuplin, deceased, subject to certain bequests.

The will thus continuing: "The said farm or tract of land and mill property to be held and worked jointly and in equal proportions by Mary Tuplin and John Torr Tuplin until the youngest child shall become of age; that the said Mary Tuplin and John Torr Tuplin shall be equally bound to provide for and support the unmarried children of Mary Tuplin and the late John Tuplin until the said children shall become of age, marry or otherwise leave their home of their own good will, after which time such children shall cease to have any lien or claim upon the said Mary Tuplin or John Torr Tuplin, and it is my intention that each child shall individually cease to have any claim upon Mary Tuplin and John Torr Tuplin, when such child shall become of age, marry or leave her home of her own goodwill, and it is further my will that when the youngest of the children aforesaid shall have become of age, or all the children provided for according to the foregoing clause of this will, then the farm or tract of land and mill property before described shall become the property of my grandson John Torr Tuplin aforesaid subject only to the support in comfort of his mother Mary Tuplin aforesaid during her natural life, or as long as she remain the widow of my late son John Tuplin, but that if the said Mary Tuplin marry again she shall forfeit all interest or claim to the provisions of this will, and I further stipulate that should the aforesaid John Torr Tuplin refuse or neglect to comply with the provisions of this will that he shall only be entitled to the sum of eighty dollars (\$80) said eighty dollars being a lien upon and payable out of the above described property, and the said eighty dollars shall constitute the sole and only interest or claim of said John Torr Tuplin upon the provisions of this will, and should the said John Torr Tuplin refuse to comply with the provisions of this will or die without issue, the property as before described shall vest in and belong to the mother of the said John Torr Tuplin (Mary Tuplin aforesaid), subject to the above stipulation as regards the children, and at her death or marriage shall be equally divided among the then surviving children."

That at the time of the death of W. B. Tuplin the said Mary Tuplin with her children, including the said John

Torr Tuplin, was living on this sixty acres; that John Torr remained for about four years on this farm, leaving it in April, 1878; that while there he looked after the mill on the farm, and helped his mother generally, but getting into debt butchering, and into further trouble, left the province and has ever since remained absent from it.

That after he so left, his mother with the assistance of her daughters lived on the farm, at times working it as best they could, and at times renting it, until her death in August, 1906, always remaining in the homestead, though according to the evidence sometimes having a hard struggle for existence.

That in December, 1881, Mary Tuplin and her children, including John Torr Tuplin, sold and conveyed to John C. Durant, one of the defendants, the mill site on this sixty acres.

In this conveyance, the will is recited thus (after reciting, *inter alia*, that W. B. Tuplin "died possessed of Mills and property at Margate):" "And whereas the said W. B. Tuplin duly made, &c., his will, &c., thereby devising the said lands to said John Torr Tuplin and Mary Tuplin upon certain conditions as set out in said will. And whereas the said will provided that should the said John Torr Tuplin refuse to comply with the provisions of the said will the said property hereinafter described shall vest in and belong to the said Mary E. Tuplin (subject to certain stipulations), and at her death or marrying should be equally divided among the then surviving or remaining children of the said Mary E. Tuplin. And whereas the said John Torr Tuplin has abandoned the said property, and has neglected and refused to comply with the conditions contained in such will, and has thereby forfeited all claim and interest in said property so far as the same is derived by virtue of said will."

This conveyance is signed and executed by John Torr Tuplin as one of the granting parties.

The consideration mentioned in this deed went to support the family—John Torr getting none of it.

Mary E. Tuplin thus being in possession of the sixty acres, less the mill site, rented it to the said John C. Durant about the year 1887, he taking it on the halves for awhile and at a rental of ninety dollars (\$90) for the remaining period. He occupied as such tenant and paid rent to Mary E. Tuplin until her death in 1906. After this, as the defend-

ant Durant states in his evidence, p. 62, in answer to this question put by the Court: "Q. Without living on it, you were working it? A. Yes, I got the crop all right, the property I live on is part of that farm, or was at one time."

On the death of the mother, one of the complainants, Hattie Tuplin, who was living with her mother on the homestead, left home to earn her living in the United States, leaving the house locked up, and in her possession when this suit was brought.

On the 11th of August, 1906 (twenty-eight years after he had "abandoned the property and neglected and refused to comply with the conditions of the will, thereby forfeiting all claim and interest therein," as he himself expressed it in the recital in the conveyance referred to), John Torr Tuplin in consideration of the natural love and affection which he bore to his sister Hannah B. Durant, wife of John C. Durant, and of one dollar, granted and assigned to her all and singular the premises comprised in and devised by the last will of the late W. B. Tuplin to the said John Torr Tuplin, bearing date the eighth day of November, A.D. 1872, and bounded as follows: (here follows description leaving out the mill site).

There are now living entitled, as claimed in the bill to partition, the said unmarried daughter, Harriet Evelyn Tuplin, and her married sisters Lucretia Ann Huestis, the said Hannah B. Durant, Christian R. Hussey, Teresa G. Woodside, Mary Eliza Leard, Annetta Jane Proffitt, Bertha Maria Lea, and Julia Sarah McPhail, all of whom with such of their husbands as are living are made parties to the bill, and against all of whom, excepting the said Hannah B. Durant and her husband, the bill has been taken "pro confesso."

These defendants in their answer, admitting or leaving to proof all the allegations in the bill, except those contained in paragraph nine, in answer to that, admit that John Torr Tuplin lived on the farm for only four years, but deny that he refused to work it jointly with his mother during her natural life; and allege that before he left he had arranged for working it in his absence, and left the province the better to assist in so working it, and had assisted and applied his personal earnings and other moneys for that purpose.

I can find nothing in the evidence to support this defence. Indeed no one can read it through without being satisfied that it is untrue. What I do find is that up to a

week before Hattie Tuplin went away the defendant or his wife had offered to pay one hundred dollars to each of the heirs for their several interests.

Under this recital of facts in what position are the defendants?

Durant taking a lease from Mrs. Tuplin is estopped from denying her title, and he must first restore any possession he got from her before he can dispute such title. And her title is based on John Torr Tuplin's abandonment of his interest under the will.

Durant's wife claiming under John Torr Tuplin, is also estopped, as by deed the latter had unequivocally abandoned and declared that he had forfeited all interest under the will. This deed can therefore only convey any share or interest John Torr Tuplin had as one of the heirs at law of his deceased mother; and, as appears by the evidence and letters annexed, John Torr Tuplin intended it for that purpose and for no other.

The defendant Durant is therefore not in possession except as a tenant of the predecessor in title of the owners seeking partition; and his wife can have no better claim than her grantor, viz., one undivided interest in the premises, as I unhesitatingly hold that his deed of the 12th December, 1881, forever estops John Torr Tuplin from claiming title under the will, even if his proved actual abandonment for twenty-eight years is not sufficient to forfeit all his claim under it.

This in my opinion is not a bona fide claim of title as opposed to that in the complaints. Also, it arises under the one instrument, the will of the late W. B. Tuplin, the effect of which is set at rest by the declaration under seal of the devisee himself, John Torr Tuplin. This question of title can as readily be settled in this Court as in a Court of Common Law, and consequently to avoid multiplicity of suits and additional costs, which some of the parties can ill bear, I adjudicate in this suit upon this title and hold that the defendants have no title to the premises save under the same right as the complainants to this bill and that there must be partition accordingly.

The usual order for sale will therefore be made, and if this matter stops here, I will settle the parties entitled and the share to each as entitled, about which there may be some doubt.

PRINCE EDWARD ISLAND.

COURT OF CHANCERY.

AUGUST 6TH, 1908.

MUTCH v. MOFFATT AND OTHERS.

Specific Performance—Necessity for Allegation in Bill that Contract was in Writing—Demurrer—Statute of Frauds—Parties.

Neil McQuarrie, K.C., and W. S. Stewart, K.C., for complainant.

W. E. Bentley and Gilbert Gaudet, for defendant Artemas Moffatt.

FITZGERALD, V.-C.:—This is a demurrer to the whole bill on the ground that the complainant's bill does not state the facts necessary to entitle him to the relief prayed, viz., specific performance of an agreement concerning the sale of lands. Clauses 3 and 4 of the bill read as follows:—

3. "That in response to the advertisement calling for such tenders the said Margaret Archibald tendered or offered in writing to the said Artemas Moffatt the sum of sixteen thousand five hundred dollars (\$16,500) for the purchase by her of all the said personal property, real estate, credits and effects free from encumbrances.

4. "That the said tender of the said Margaret Archibald being the highest of all those which were offered to the said Artemas Moffatt for the purchase of the said property, was duly accepted by the said Artemas Moffatt."

This demurrer is filed by Artemas Moffatt, one of three defendants. The other two defendants answer to the bill, denying that such acceptance of Margaret Archibald's offer was made in writing.

The bill contains no other allegation in reference to the matter, and it is contended that those contained in the clauses quoted amount to nothing more than an allegation of a verbal agreement, and that consequently the defendant may avail himself of the Statute of Frauds by way of demurrer.

I cannot say that it is quite clear to me whether the demurrer should succeed or not. The books of Chancery Practice, Daniel and Lewis, incline to the rule that that which

is only required by statute to be in writing, need not be pleaded to be in writing, though it must be proved so; while on the other hand the authorities, *Whitechurch v. Bevis*, 2 Bro. C. C. 559, *Redding v. Wilkes*, 3 Bro. C. C. 401, as approved in the later cases of *Wood v. Midgley*, 5 De G. M. & G. 41, and *Barkworth v. Young*, 3 Jur. N. S. 34 (cases in which specific performance was sought), rest the matter upon the construction of the words used, asking the question, do the statements in the bill clearly show that the complainant is entitled to the equitable relief prayed? From the language used is it sufficiently apparent, that if a writing is necessary for the complainant to succeed, that such writing exists or is claimed to exist?

All these cases apply to the practice of our Court as settled in our statute of 1849, and settle the practice that this defence may be made by demurrer.

I have therefore to determine this demurrer on a construction of clauses 3 and 4 of the Bill.

The words "duly accepted" might reasonably mean accepted as by law required, namely, in writing, and were it not that in the preceding clause it is stated that the tender was "in writing," it would be fair in a matter of pleading to hold so. The change of language only throws a doubt upon such a construction.

In this case the issue, writing or no writing, is squarely raised by the other defendants in their answer. I am in this position therefore:—

If the finding on such issue is in complainant's favour he would probably succeed; and no injury can be done either party, presuming, as I must, that the words "duly accepted" are honestly used, by allowing the trial to proceed on the statements contained in the bill, provided no costs be paid if it be found that the words are a mere cover of a weakness in complainant's case.

On the other ground argued on this demurrer, viz., that there are improper parties with conflicting interests joined as complainants, I do not think the cases cited by counsel for the demurrer apply. It cannot be said that any of the parties here complainants are strangers to the contract, and here the person having the equitable interest, seeking to enforce his rights joins with him in the suit the person having the legal interest, that she may be bound by the order and

decrees made in the cause. I think that is right, and requires no lengthened consideration at my hands.

I will consequently overrule the demurrer, the costs of such overruling to be costs in the cause. *Johnnasson v. Bonhote*, 2 Ch. Div. 298.

NOVA SCOTIA.

SUPREME COURT.

IN CHAMBERS.

JULY 24TH, 1908.

DOMINION COAL CO v. BURCHELL.

*Pleading—Striking out Portion of Defence as False, etc.—
Costs—Practice.*

Application to set aside pleas as false.

GRAHAM, E.J.:—This is an application to strike out a portion of a defence as false, etc. Part has already been struck out on another ground. It is assumed that there still remains an allegation that the defendant did not receive the cheques in question. These were McKinnon & Moffatt's cheques, given for flour supplied to them by the plaintiffs, but unfortunately made payable to the defendant an employee of the plaintiffs, and as is alleged, improperly used by him.

The plaintiffs show that the defendant undoubtedly received the cheques in question, but in these applications to set aside pleas one must look altogether to the defendant's affidavits answering the plaintiffs to see if he has any defence. The evidence cannot be weighed. I have read over the affidavit produced by him and I can find nothing which would justify a trial of the action. After a criminal trial which no doubt involved on his part a searching investigation to discover if possible any mistake on the part of the Crown, he is not able to say that in respect to any one cheque there was any mistake about it. He says, "I say that I am unable to say whether I received any of them or not, although it is probable I received three of them." Now it is peculiar that in his accounts with the Bank of Montreal there are items of the corresponding dates and amounts of those cheques,

which tend to show that he deposited with that bank to the credit of his own private account two cheques and the proceeds of a third. And this it is no doubt which makes it probable as to those three. Again he says, "Whilst it is quite probable that the items mentioned in the statement of claim were paid by Messrs. McKinnon & Moffatt, I say that I do not know whether they were paid to myself or the other clerks and employees of the Dominion Coal Co. in the general office of the company, and the different company stores."

But the stubs of the cheques in McKinnon & Moffatt's cheque book, at least all that could be found, are all against the defendant, and Moffatt swears that they were made payable to his order. Such a statement is mere evasion on the part of the defendant, and irrelevant because some of the cheques may have been physically handed to another employee.

These cheques were for large amounts, averaging \$400 or \$500, 18 of them in all, made between July 21st, 1903, and October 31st, 1905. Surely if the defendant did not receive them or the proceeds of them his memory would not be so much in blank on the subject. And if the pleading is false as to three of these cheques, there is authority for setting it aside because he could have admitted as to these and denied as to the others.

I really think that there is on the defendant's own showing nothing to try and the defence must be set aside with costs.

NOVA SCOTIA.

SUPREME COURT.

JULY 28TH, 1908.

IN RE JAMES LING.

EX PARTE JAMES LING, JR.

Mortgage—Ejectment Action—Judgment—Lapse—Acts of Possession—Execution—Costs.

Application for funds paid into Court.

H. Mellish, K.C., W. H. Covert, T. R. Robertson, and F. McDonald, for various claimants.

GRAHAM, E.J.:—The Josts, who had a mortgage upon certain land of James Ling, brought an action of ejectment against him, and recovered a judgment by default with costs, he not having appeared. The date of the judgment is April 14th, 1858. No step was ever taken upon this judgment except to register it, I suppose, in order to secure a lien for the costs. No kind of execution was issued upon it, it was never revived, and no possession of the land was ever taken under it. James Ling continued to remain in possession of the land until the year 1879, more than 20 years after the date of the judgment. Then he went to live with his son in Glace Bay, where he died in 1883. The actual possession of this property was abandoned after he moved away.

On the 31st day of December, 1864, the Josts assigned the judgment in ejectment to Thomas Ling, his son.

Recently the Dominion Coal Company expropriated this land and paid the compensation money into Court under the Mines Act.

The contest is as to who is entitled to this money, the heirs of James Ling, or the assignee of the judgment? Of course he happens to be an heir too.

I am of opinion that the judgment in ejectment after the expiration of 20 years from its date could not be enforced. It was dead before James Ling moved from the land. I find as a fact that no possession of the land was taken under it, and I can discover nothing which made it valid after that period.

That a judgment in ejectment required to be revived at common law I refer to Bacon's Abridgment, 'Title Execution, H. And that there must at least be possession under it, if no *habere facias possessionem* was issued, I refer to *Des-Barres v. Shey*, 29 Law Times, N. S., at p. 594.

In consequence of a statute in force, Rev. Statutes 1 series, c. 117, somewhat similar to 7 George 2, c. 20, providing in certain contingencies for a sale of the land in the ejectment action by a mortgagee, I suggested at the hearing that the ejectment action might still be considered as pending, but there was nothing in the suggestion. *Amis v. Lloyd*, 3 V. & B. 15; *Wilkinson v. Traxton*, Selwyn's N. P. 703; *Hurst v. Clifton*, 4 Ad. & Ell. 814.

Then as to the possession of the heirs of James Ling. Assuming after James Ling moved away, that, for many years, there was no one in actual possession, the possession

in those circumstances must be deemed to have been in those having the legal title, the heirs of James Ling, and there being no one in actual possession the statute was not running against them.

The recent acts of possession under a deed given subsequently to November, 1907, by Thomas Ling, who, as I said, is one of the heirs to James Ling, Jr., are not sufficient to displace the legal title of the heirs of James Ling.

No doubt James Ling, junior, will be entitled under his deed to participate with the heirs of James Ling in the fund in Court.

The fund will be distributed amongst the heirs of James Ling and their assignees.

The costs of the heirs (one bill) will be paid out of the fund; also the costs of the petition and application for the proceeds of James Ling, junior, but not the costs of the contest.

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NOVA SCOTIA.

SUPREME COURT.

JULY 24TH, 1908.

EVITTE v. SMITH.

Will—Construction—Executors—Action for Account.

Action for an accounting by the executors of the last will of Bennett Smith.

H. McInnes, K.C., for plaintiff.

R. E. Harris, K.C., W. B. A. Ritchie, K.C., W. M. Christie, K.C., and T. W. Murphy, for various interests.

LONGLEY, J.:—This is an action arising out of the estate of the late Bennett Smith. He left a large estate valued at over \$500,000 and the defendants are the trustees and executors under the will. The plaintiffs are the children of John M. Smith, a son and executor of Bennett Smith, and they ask for an accounting by the executors and trustees of their management of the estate and also for their removal from office.

Since the action was brought and defence put in an arrangement has been come to by the various persons interested in the estate, but this can scarcely be effective unless a judicial interpretation is given to the word "issue" in the residuary clause of the will, which reads as follows:—

"Nineteenth:—All the rest and residue of my estate of every nature and kind whatsoever real and personal and mixed and wheresoever situate, including all sums that may

hereafter revert to and become part of my estate in consequence of the happening of the contingencies specified herein or any of them or otherwise I desire to be kept invested and profitably employed until the death of one or other of my sons John or Charles DeWolf, and I desire and direct that upon the decease of one of them that shall first die the one-half part of the residuary estate shall be divided among the children of the one so dying in equal shares and in case the one so dying shall leave no issue him surviving then the said share shall go to the surviving brother for his life and at his decease shall be divided among his children in equal shares. I desire and direct that upon the decease of the surviving son of my said two sons, the other half part of the said residuary estate shall be divided among the children in equal shares and in case he shall leave no issue him surviving the said half part shall be divided among the children of the other deceased brother."

It may be stated that at the present time both John M. Smith and C. DeW. Smith mentioned in this clause as the residuary legatees are living, and both of them have several children now living, and likely to outlive either of them. So the contingency which arises at the present time for consideration is very remote, namely, the decease of either John M. or Charles DeW. without children. But it is a contingency, and to meet it Mr. James A. McDonald, barrister, has been joined, as defendant to represent the interest of existing or unborn children, who might hereafter have interests by the death of all the children of John Smith before his death, or all the children of C. DeW. Smith before his death. By agreement this question of interpretation has been argued before me, by learned counsel representing the plaintiffs, counsel representing the defendants, and by Mr. McDonald representing the interests of grandchildren existing or unborn. It was contended by the counsel for both plaintiffs and defendants that in the clause above quoted, the words "Shall leave no issue him surviving" must be interpreted as "Shall leave no children him surviving," while Mr. McDonald strenuously contended that the words must be construed in their natural and literal sense as lineal descendants of the body and would include grandchildren or great grandchildren of either John M. or Charles DeW. Smith.

The point is a somewhat difficult one, and certainly a very delicate one. No law dictionary gives any definition of

"issue" which assists in the determination of the question. The general principle of interpretation of language of wills is that the obvious meaning and intention of the testator is to be sought, and must be determined by giving the usual grammatical effect to the words used. But even the means of seeking to give effect to certain words and expressions have been already made subject to certain judicial decisions which must be weighed in seeking to determine what effect must be given to words and phrases.

On the argument I must confess I was most impressed with the view presented by Mr. McDonald, and it seemed to me to represent the more obvious intention of the testator. But I have been favoured with briefs of counsel on both sides, and I have personally read the authorities cited in large numbers, and I am convinced by these that I cannot give to the word "issue" in the 19th clause of the will the wide meaning for which Mr. McDonald contends. It seems to me the weight of authority is against it.

The case which appears to me to come nearest to the one before me is *Pride v. Fooks*, 3 DeG. & J. 252. In that case, the residue was to be held in trust for and for the only benefit of such child or children as they, my said nephews and nieces, Walter, Thomas and Dorothy, shall leave at the time of their respective deceases,—one-third to the child or children of the said Walter, and two-thirds to the child or children of Thomas and Dorothy. In case either of these nephews or nieces should die without leaving any children or child, then such share is to be divided among the child or children of the other two; in case all of his nephews and niece should die, without leaving any issue, lawfully begotten, then the residue is to go to the children of Peter Gaffer. The two nephews and the niece died without children or child, but Dorothy had a number of grandchildren living. The disposal of the residue was contended for by three interests.

1st, the grandchildren of Dorothy, who contended that she had not died without leaving issue lawfully begotten; they were issue lawfully begotten.

2nd. The children of Peter Gaffer, who claimed that Dorothy had died without leaving issue.

3rd. By the heirs at law of the testator, who claimed intestacy.

Lord Romilly, Master of the Rolls, decided that the residue must go to Dorothy's grandchildren, as lawful issue of her begotten.

The matter was taken to the Court of Appeal, and in very full and elaborate judgments read by Knight Bruce, L.J., and Turner, L.J., the Court of Review unanimously reversed this decision and decided that "without leaving issue lawfully begotten," applied only to children of Walter, Thomas and Dorothy, and that consequently in this case there was an intestacy as to the residue. Sec. 28 L. J. Ch. 81.

I have searched in vain to find any questioning or overruling of this case; on the contrary, I have found it frequently referred to in judgments upon similar points as conclusive authority. I think it strikingly resembles the one before me. There is a similar mingling of the use of the terms "children" and "issue," and the Court thought that the testator used the word "issue" in such a sense as obviously meant children, and I am forced to the conclusion that upon this authority I am bound to hold that Bennett Smith used the word in a similar sense.

In *Marshall and Baker*, 31 Beaven 608, a construction of the word "issue" occurred in a marriage settlement, by which the intended wife settled £5,000 upon her husband in trust for his use during his life, then to her use during her life, then to the issue of their bodies on the death of the survivor. The wife acquired additional property during coverture. She left two sons her surviving, each of whom had three children. In the distribution of the £5,000, as well as the other property of the deceased wife, the grandchildren claimed to participate on the ground that by the terms of the settlement the property upon the death of the survivor was to go to the issue of their bodies, and they, the grandchildren, were such issue. Sir John Romilly held that "issue" meant "children," and that grandchildren could only acquire any interests through their parents. The Vice-Chancellor said if the matter had arisen in the case of a will he could have had no doubt that "issue" meant "children."

My view, already expressed, is strengthened by a careful examination of the cases submitted to me by Mr. McDonald in his elaborate brief. I cannot find one of them which touches the point at issue. *Andree v. Ward*, 1 Russ. 260, simply decided that though a son had not issue by a wife of

the description designated in the will, but had issue by a wife not of the description designated in the will, he did not die without issue of his body lawfully begotten, and therefore the remainder man could not take as in the case of failure of issue, though the children of the son could not take because they were not begotten of a mother of the description designated in the will. But this does not appear to me to have any bearing on the point now before me. And I might so dispose of every case submitted.

Therefore, after careful consideration, and not without some reluctance, I reach the conclusion that the words "shall leave no issue him surviving," means "shall leave no children him surviving," and consequently that no interest under this residuary clause extends beyond the children of John M. and Charles DeW. Smith, and the persons represented by Mr. McDonald have no interests which the Court is bound to regard.

NOVA SCOTIA.

SUPREME COURT.

DRYSDALE, J., AT CHAMBERS.

AUGUST 12TH, 1908.

IN RE G. T. N. MILLER.

Will—Construction—Power of Sale—Trust—Executor—Costs.

R. E. Harris, K.C., for petitioner.

W. B. A. Ritchie, K.C., for respondent.

The last will and testament of G. T. N. Miller contained the following provisions:

"I appoint my said daughter, Alicia F. Gray, sole executrix and trustee of this my said will and testament, and I give to her as such executrix and trustee full power to sell all or any portion or portions of my real estate, either by public or private sale or sales, and for such price or prices as to her shall seem best in the exercise of her discretion for the general interests of my estate as well as also for the purposes of obtaining by such sale or sales and setting apart a principal fund and applying a sufficient income therefrom paragraph of the will) "as aforesaid, for and during his to and for the comfortable maintenance and support of

my said son" (an invalid son referred to in the previous natural life, and I also give to my said executrix and trustee full power to execute and deliver to the purchaser or purchasers upon such sales good and sufficient deeds of the lands so sold, etc."

After the death of the executrix and trustee named in the will, her son, Reginald J. Grant, who was also her executor, undertook to carry out the trusts mentioned in the will of G. T. N. Miller.

One of the beneficiaries under the last named will took out an originating summons under the Trustees Act praying:

1. For administration of the estate of G. T. N. Miller,
2. For the appointment of a new trustee,
3. For an accounting by Reginald J. Grant.

DRYSDALE, J.:—The contention here is that the power of sale contained in the will under the trust for the invalid son, remains in the executor, and that the trustee appointed therein must resort to the executor to sell any land required to carry out the trust.

In my opinion the trust created for the son attaches to the office of trustee, and the power to sell and carry on the trust is in one and the same person.

I think the order moved for should issue.

I do not think that Reginald J. Grant can have his costs of opposing the motion out of the estate.

NEW BRUNSWICK.

BARKER, C.J.

AUGUST 18TH, 1908.

SUPREME COURT IN EQUITY.

EARLE, TRUSTEE, ETC., OF LAWTON v. LAWTON,
ET AL.

*Construction of Will—Gift to Class—Determination of Class
—Period of Division—Income — Maintenance Clause —
Discretion of Trustee.*

W. A. Ewing, for the plaintiff,

A. W. Macrae, J. Roy Campbell and K. J. Macrae, for
defendants.

BARKER, C.J.:—When this cause came on for hearing before, it was held that the defendant VanDyke Lawton, though born after the testator's death, was entitled to a share of the estate. See ante, p. 472.

The plaintiff now asks for further directions, which involve other questions as to the construction of this will. The directions sought are as follows:—

1. Is Alice Lawton entitled to a share of the accumulated income on hand when she attained the age of 25 years, as well as of the capital, and if so to what proportion?

2. Is Alice Lawton's share of the estate, or any and what part of it, payable to her now, or when is it payable? If not how is it to be held?

3. Should the shares of the other parties interested under the will be set apart now, or should any and which part of such shares be set apart?

4. If so, how should such shares be ascertained as regards capital and the accumulated income respectively?

5. If such shares should be set apart now, should any and which of them be held in trust until the parties respectively attain the age of twenty-five years, or should such shares or any and which of them be paid to the guardians, or to whom and when are such shares to be paid?

In addition to the facts stated in the report of the previous hearing (see ante 472), the following may be stated; The four children of James Clark Lawton who are living are, Eliza, who was born August 8th, 1886; Benjamin, who was born December 16th, 1887; Richard Woofendale, who was born January 10th, 1891, and VanDyke, who was born February 19th, 1906; and the three children of Charles Abbott Lawton now living are, Alice, who was born January 29th, 1893; William Parker, who was born March 9th, 1886, and Herbert Clarence, who was born April 17th, 1891, the other son, Charles Ralph, having died March 23rd, 1904, at the age of 17, without having been married.

The trustees' accounts were passed and allowed up to August 22nd, 1907, at which time the capital fund was \$52,687.04 and the accumulated income \$6,532.10, making in all \$59,219.14, all of which with the exception of \$319.14 is invested in mortgage securities. The total amount paid up to that time for maintenance was \$6,575. Of the seven children entitled to participate in this fund, at present Alice

has attained the age of 25 years—Eliza and William Park r are between 21 and 25—and the others are infants.

It is, I think, clear by the terms of the will that Alice is now entitled to be paid what the trustee may consider to be her share in the estate, on the basis of an equal division between the seven children now living. That amount can never decrease, because when once paid it cannot be got back. (*Gilman v. Daunt*, 3 K. & J. 48.) It is, however, subject to increase by reason of the share of any child falling in, should he die without issue before attaining the age of twenty-five. It is clear I think that the testator intended that as each child reached the age of 25, he should then be entitled to be paid his share of the estate, to be determined as directed by the will, he then taking an absolute interest in his share entitling him to its use, possession and enjoyment. What interest in the estate have these children previous to attaining the age of 25? Is it more than a contingent interest becoming absolute only on their attaining that age?

The intention of this testator, in some respects at all events, is clear, whatever difficulties there may arise in carrying it out. It seems evident that he intended that his two nephews' children should be maintained and educated during their minority, and he placed the income of his estate at the disposal of his trustees, to be used in their discretion for that purpose. It seems equally clear that he intended his estate to be divided equally among such of these children as should attain the age of 25 years, subject to this, that if any one died before reaching that age leaving children, these children should take the parent's share, just as the parent would have taken it had he lived—not as his next of kin, but under the will by way of substitution. It is a direct gift by the testator for their benefit in such a case. The provision for maintenance is confined to the nephews' children only. By the will, all the testator's property is given to his trustees in trust to carry out these two objects, after payment of debts and testamentary expenses. The first trust, in point of order, is a trust "to pay from time to time so much of the income of my said estate as they (the trustees) in their discretion shall see fit, towards the support, maintenance and education of the children of my nephews James Clark Lawton and Charles Abbott Lawton, until they shall respectively arrive at the age of twenty-one years." There is no gift of this income to these children. It is subject to the control of the trustee

for the benefit of the whole class, and it was known that as a necessary result of the disparity in the children's ages, that some would require allowances for a longer period than others, and therefore the appropriation of the income need not necessarily be on the basis of equality. In *In re Parker*, 16 Ch. D. 44, the will contained the following provision: The residuary estate was given to trustees "in trust for sale and conversion, and to invest the proceeds upon the stocks, funds and securities therein mentioned, and to stand possessed of the stocks, funds and securities upon trust, to pay the dividends, interest and income thereof, or such part thereof as my said trustees for the time being shall from time to time deem expedient, in and towards the maintenance and education of my children, until my said children shall attain their respective ages of twenty-one years; and from and immediately after their attaining their respective ages of twenty-one years, then upon trust to pay, assign and transfer the said stocks, funds and securities to my said children in equal shares, &c." One of the children died an infant, and it was held that he took no share. *Jessel, M.R.*, says: "In my opinion, when a legacy is payable at a certain age, but is in terms contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees shall pay the whole or such part of the interest as they shall see fit. But I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age."

In *In re Grimshaw's Trusts*, 11 Ch. D. 406, the same principle was acted upon. *Hall, V.-C.*, says: "It appears to me that in this will there is no gift of any of the capital fund to any child who did not attain the age of 21 years. It may perhaps be considered to be a somewhat critical mode of construing wills like this one, to notice whether the gift of the capital fund comes first, or whether the direction for maintenance does. In this will" (as in the present one) "the direction for maintenance comes first, and that circumstance is one which, in the present state of the authorities, cannot be disregarded." The trust there was to apply "the income,

or so much thereof as the trustees shall think proper in the maintenance of the children." Hall, V.-C., held that this was a trust not in respect of the income of the whole fund, but only of the income of the whole fund, or of so much as the trustees should think proper. The trust there was, that upon the attainment by the children of the age of 21 years, the trustees were to pay and divide the same principal and the accumulations. Hall, V.-C., held that this trust was only for the benefit of those who attained the specified age, and that they were not to take unless they fulfilled that description. The children therefore who died in infancy were excluded.

In *In re Coleman*, 39 Ch. D. 443, the trust was to apply the income of the testator's estate "in and towards the maintenance, education and advancement of my children, in such manner as they shall deem most expedient, until the youngest of my said children attains the age of 21 years," and in the happening of that event he directed them to divide his estate equally among all his children then living. Cotton, L.J., says: "The contention of the appellant was that each of the four children took a vested interest in one-fourth of the income till the youngest child attained 21. I am of opinion that no child has a right to any share of the income. The trustees have a discretion to apply the income for the maintenance of the children in such manner as they think fit. This excludes the notion of the children being entitled to aliquot shares. I will assume, though I do not decide, that the trustees have no power to exclude a child, but I am clearly of opinion that under this power they could make unequal allowances for the benefit of the children, and might allow only half a crown to one of them."

In *Leake v. Robinson*, 2 Mer. 363, the testator gave to trustees certain real estate and certain ground rents upon trust, to apply the said ground rents and the rents and profits of his said estate, and interest of the said mortgage moneys, or such part as they should judge proper, to the maintenance, education or advancement of his grandson until 25, and after his attaining that age, to pay to or permit him to have and receive the same during his life, etc., and to pay, assign and transfer the said property to such child or children at 25, if sons, etc. The Master of the Rolls, after pointing out that there was no direct gift to any of the classes, and that it was only through the medium of directions given

to the trustees that the benefits intended for them could be ascertained, says: "As to the capital, there being, as I have already said, no direct gift to the grandchildren, we are to see in what event it is that the trustees are to make it over to them. There is with regard to this some difference of expression in the different parts of the will. In some instances the testator directs the payment to be to such child or children as shall attain 25. In others the payment is to be made upon attainment of the age of 25." (In this case the words are "and on each child attaining the age of 25 years, &c.") In the residuary clause it is from and immediately after such child or children shall attain the age of twenty-five that the trustees are to transfer the property. But I think the testator in each instance means precisely the same thing, and that none were to take vested interests before the specified period. The attainment of 25 is necessary to entitle any child to claim a transfer. It is not the enjoyment that is postponed; for there is no antecedent gift, as there was in the case of *May v. Wood*, 3 Bro. Ch. C. 471, of which the enjoyment could be postponed. The direction to pay is the gift, and that gift is only to attach to children that shall attain 25. The case of *Batsford v. Kebbell*, 3 Ves. Jr. 363, was much more favourable for the legatee, for the interest of the fund was given to him absolutely until he should attain the age of 32, at which time the testatrix directed her executors to transfer to him the principal for his own use. He died under 32. Lord Roselyn said: "There is no gift but in the direction for payment, and the direction for payment attaches only upon a person of the age of 32. Therefore he does not fall within the description:" *Selby v. Whitaker*, 6 Ch. D. 239; *Jobson v. Richardson*, 44 Ch. D. 154; *Hunter's Trusts*, 1 Eq. 295.

From these and numerous other authorities to the same effect, it seems clear that under a maintenance clause such as the one in this will, no one child can obtain a vested interest in any share of the income. The trust as to the distribution of the estate, by which I understand the capital and unexpended income, is as follows: "And on each child attaining the age of 25 years, to pay to such child, what they (the trustees) consider would be his or her share in my said estate, dividing the same equally between such children living, and the children of any deceased child, when such payment shall be made, &c." There is no clause in this will giving this estate to

these children, except the direction to the trustees to pay to each child, on his attaining 25, what they consider to be his share. The giving of the property consists in the direction to transfer the share, which is only on the child being 25, and until he has attained that age he has no right to call for payment.

It would, I think, be disregarding the clear language of the will, to hold that there was not to be a division made by the trustees, on each child attaining 25, for the purpose of ascertaining what at that time is to be paid over to him as his share. A final division cannot be made until all have fulfilled the conditions subject to which they are entitled to be paid. I think Alice is entitled to have paid to her what the trustee considers to have been one-seventh of the principal of the estate on the 29th January, 1908. The balance of the whole fund will remain in the trustee's hands until another child shall reach the age of 25, when the trustee will make a division as before. If in the meantime any child, other than Alice, shall have died without leaving children, that share shall fall in as part of the estate divisible among the survivors of the class. If such child shall have children, they would take their parent's share, and when entitled to have it transferred to them, if they are then infants, the shares would be transferable to their guardians. As to the accumulated income, I do not think the children are entitled to any division of it, until all the children shall have attained their majority, or for that or any other reason, all possible claims upon the fund shall have ceased.

There will be the following declaration:

1. That VanDyke Lawton is entitled to a distributive share of the estate, as one of the nephews' children.

2. That Alice Lawton, on her attaining the age of 25 years on the 29th January, 1908, took an absolute vested interest in $\frac{1}{7}$ of the estate, and was then entitled to be paid what the trustee considered to be $\frac{1}{7}$ of the capital fund for her own use.

3. That Alice Lawton is not now entitled to any share of the accumulated income. That is to remain in the trustee's hands, to be used at his discretion in the support, maintenance and education of the infant children of James Clark Lawton and Charles Abbott Lawton until they attain the age of 21 years.

4. That the remainder of the capital fund is not to be set apart, but held by the trustee until another child reaches the age of 25 years, when another division of the capital fund will be made.

The costs of all parties will be taxed as between solicitor and client, and paid by the plaintiff out of the corpus of the estate.

NOVA SCOTIA.

IN THE SUPREME COURT.

LONGLEY, J., AT CHAMBERS.

SEPTEMBER 29TH, 1908.

HOBRECKER v. SANDERS.

Practice—Application to Sign Judgment by Default after Appearance.

Application on behalf of plaintiff after appearance entered for judgment in default of pleas. After the summons was issued pleas were filed.

LONGLEY, J.:—Whatever may be my views as to the power of the Court under our Judicature Act to give effect to Order XIV. after plea, I have no doubt that I cannot interfere with the pleas pleaded in this case on the faith of an affidavit made by Mr. Hobrecker some time before pleas were filed. I cannot read into his affidavit sufficiently definite contradiction of the specific statements in the defence to justify me in exercising the power conferred by Order XIV. I think, after the defence had been filed, the plaintiff should have furnished a sworn statement touching the defence before making this application. If I have power I am willing to enlarge the application to enable plaintiff to furnish further sworn statements in this matter to which defendant shall be at liberty to reply. If I have not such power then my only course is to decline the present application and give plaintiff leave to renew it upon further affidavits. I will enlarge if plaintiff's counsel takes the responsibility of my authority so to do.

W. B. A. Ritchie, K.C., and Terrell, for plaintiff.

H. Mellish, K.C., for defendant.

NOVA SCOTIA.

Court of Probate, 1908.

(Before His Honour Judge MacGillivray).

In re estate of Samuel Archibald, late of Glenelg, within the District of St. Mary's, in the County of Guysborough, farmer, deceased.

Intestacy — Administration — Division of Real Estate — Dower.

On a special case stated setting forth that the deceased died on the 28th of June, A.D. 1877, intestate, seized and possessed of real estate situate at Glenelg aforesaid, leaving him surviving a widow, two sons (John C. and George Alexander), and one daughter (Janet).

That the deceased's son, John C., died in 1901 intestate and without issue, leaving him surviving his widow, Maria Archibald; and his brother and sister (Alexander George and Janet).

That the deceased's real estate remained undivided; and his estate was not administered until the spring of 1903, when administration was granted to the said son, Alexander George Archibald.

That since the granting of administration, application was made to the Court of Probate, and Commissioners were duly appointed for the division of said real estate amongst the persons by law entitled thereto; and the said Commissioners have presented a plan of division.

That the widow of the said John C. Archibald claims, in addition to one-half of her husband's interest in full, dower in the other half of his interest or distributive share in his father's lands.

Question.—Is the said Maria Archibald, widow of the said John C. Archibald, entitled to dower in the other half in her said husband's distributive share of the said lands in addition to the half already allotted her therein by said proposed division? What interest in the lands of her said husband is the said Maria Archibald entitled to take?

For the widow, Maria Archibald, the contention is, that she is entitled: (1) To dower in the whole of her husband's share of the lands; (2) to one-half of the whole in fee.

In support of this contention, the provisions of sections 4 (1) and 16 of chapter 140 R. S. N. S. 1900, "Of the descent of real and personal property," are invoked.

Section 4 (1) reads:—

"If the intestate leaves no issue nor father, one-half of his real property shall go to his widow, and the other half in equal shares to his mother, brothers and sisters, and the children of any deceased brother or sister by right of representation."

Section 16 reads:—

"Nothing in this chapter contained shall affect the title of a husband as tenant by the curtesy, nor that of a widow as tenant in dower."

On behalf of the other heirs it is contended that sec. 4 (1) disposes of the whole estate in this case and leaves no residue from which dower can be assigned; that the widow's dower is merged in her fee of half of the estate; that there is no authority for a claim of half dower.

Counsel for the widow admits that in cases coming under the provisions of sec. 3 of said chapter she could not claim dower, as the right of dower is expressly taken away. "If the intestate leaves no issue one-half of his real estate shall go to his father and the other half to his widow in lieu of dower." If these words "in lieu of dower" were repeated after the word "widow" in sec. 4 (1), the present difficulty would not arise. If it was the intention of the legislature that one-half only of the real property should go to the widow it is not so expressed.

The rules of descent are now contained in the provisions of c. 140, appear first in 5 V. c. 22, entitled "An Act relating to the Courts of Probate and the settlement and distribution of the estates of deceased persons," s. 18 thereof. The first sub-section is the same as the 2nd section of the Descent Act (c. 140). The second sub-section is substantially the same as s. 3 of said Act. The third sub-section is substantially the same as s. 4 of said Act, but the first provision thereof seems to be incomplete. It reads: "Thirdly—If he shall leave no issue, nor father, one-half of his real estate, if there be a widow, and if not the whole shall be distributed in equal shares to his mother, brothers and sisters, etc." This was the law from 1842 to 1851, when the first series of the Revised Statutes were passed, and the above sub-section (3rdly)

amended so as to read the same as the corresponding provision in the subsequent revisions.

In this revision of 1851, the rules respecting the descent of real and personal property are collected into one chapter (115), under the head "Of Descent of Real and Personal Property," separating them from the provisions respecting the constitution and practice of the Probate Court, to which is assigned a different chapter. In the various subsequent revisions of the statutes, c. 115 is copied with no material change in the rules respecting the descent of real property. I have traced the rule on the point in dispute from its first enactment in this Province down to the present time in order to discover if it was the intention of the legislature that the words "in lieu of dower" are to be understood as repeated after the word "widow" in the second line of the 4th section—these words having been expressed after the word "widow" in the 3rd section of said c. 140, and thereby limiting the widow to an estate in fee in one-half and no more. Were it permitted to make such an insertion in s. 4, the contention herein of the widow could not have any apparent support. But "it is our duty neither to add to nor take from a statute unless we see good grounds for thinking that the legislature intended something it has failed precisely to express:" Per Tindal, C.J., in *Everett v. Wells*, 2 M. & G. at p. 277. The general rule is: "Not to import into statutes words not to be found there." (See per Patteson, J., in *King v. Burrell*, 12 A. & E. at p. 468). My purpose also for tracing the rule was to see if there has been any material change in the original enactment. There has been none. I may here remark that I have been unable to ascertain that the question raised in this case was ever raised in this Province since the passing of the Statute of Distributions. I am therefore led to the conclusion that the law has been interpreted that the widow, under the provisions of s. 4 (1), takes a moiety of the real property in fee and none in dower. I have also been unable to find corresponding provision in the Statute of Distribution of Real Property of any other country.

In this case I apprehend that it is my duty to construe the provisions of s. 4 (1) and ascertain their legal effect on the respective claims of the parties at variance.

When the intestate leaves a widow and father, the law expressly states that a widow shall take one-half absolutely

in lieu of dower. In the case where he leaves no father but leaves a widow, mother, brothers and sisters, etc., one-half of the real property shall go to the widow, but it does not say in lieu of dower. Applying the maxim "*expressio unius exclusio alterius*," it would appear from a superficial reading of these clauses, 3 and 4, together with 16, that the widow is entitled to dower in addition to the one-half fee. But I am of opinion that the phrase "in lieu of dower," in s. 3, is unnecessary—that it is a mere surplusage. The widow, under the provisions of these sections, takes one-half of the real property in fee, and the father, or mother, brothers and sisters, etc., as the case may be, take the other half. They are all co-parceners—heirs to Samuel Archibald, the ancestor. The law casts the estate on the widow, together with the father, or with the mother, brothers and sisters, as the case may be, whether they will it or not. "The law casts the freehold on the heir immediately on the death of the ancestor." "Until assignment of dower the widow has no estate, but only a right of dower." (See *Smith's Real and Personal Property*, 6th ed., p. 225). The estate in fee is a higher estate. Where these two estates meet in the same person, merger takes place.

On the death of the ancestor, John C. Archibald, there was a union of the freehold in fee and the inchoate life estate by right of dower in his widow; and the greater estate therefore drowned the less. The operation of this statutory enactment, which seems to succeed the widow's common law right of dower, occasions no injury to her. She takes a larger portion of the real property and a greater estate therein, under the statute, than she would take as tenant in dower; and consequently no injury is occasioned to her by this act of the law. It would seem, therefore, that this is clearly a case of merger of the two estates—the estate in fee and the estate of a right of dower.

Having come to the conclusion that the estate in fee, as held in concurrent ownership by the widow and her brother and sister-in-law, the estate of a higher degree meets with the estate of inferior degree, and merger is therefore produced.

The claim is made on behalf of the widow that she is entitled to half of her husband's interest in fee, and dower in the other half. It is difficult to conceive how this claim

can be realized. On the death of Samuel Archibald, his children took the whole estate as co-parceners. The share of John C. Archibald, one of his children, is set apart. This share goes, one-half to his widow, and the other half to his brother and sister in equal shares, and they hold the said share by unity of possession. The inferior life estate—inchoate life estate—is therefore absorbed in the higher estate in fee, and entirely disappears. On partition between the widow and her brother-in-law and sister-in-law, she takes one-half in fee, and they take the other half in fee. In this division the right of half dower in the shares allotted to the brother and sister is not revived. Hence there is no right of dower remaining which the widow can claim as against the brother and sister.

The proposition of law advanced on behalf of the widow's contention would seem to resolve into a *reductio ad absurdum*. Applying thereto the principles which govern in such cases as the one under consideration, no other conclusion can be arrived at. "A widow entitled to dower did not at common law have any estate in the lands until assignment. She was not entitled to joint possession with the heirs; therefore she was not a tenant in common. But, whenever the common law, under which the widow at the death of her husband has the right to the possession of one-third of his real estate, there she is tenant in common with the heirs. In such case her right of entry does not depend upon assignment or dower, which is a mere severance of the common estate:" Freeman on Co-Tenancy and Partition, s. 108. The statement of the proposition is a hypothesis contrary to the law as above quoted.

The contention on behalf of the widow is not, in my opinion, sustainable.

The answer to the questions will be:—

1st. The said Maria Archibald, widow of the said John C. Archibald, is not entitled to dower in the other half of her late husband's distributive share of the said lands in addition to the half already allotted her therein by the said proposed division.

2nd. It follows as a corollary of the main proposition that the interest the said Maria Archibald is entitled to take in the lands of her husband is one-half in fee and none in dower.

The reason of expressly saving dower to the widow, under s. 16 of c. 140 (above quoted) is, I apprehend, declaratory

of her common law right in the case of the lands of the intestate devolving to his children as provided by s. 2 of said chapter.

William Chisholm, solicitor of Maria Archibald.

H. T. Harding, solicitor of the other heirs.

NOVA SCOTIA.

TOWNSHEND, C.J.

MARCH 17TH, 1908.

HALL v. ANTROBUS ET AL.

Partnership—Action for Dissolution—Receiver—Subsequent Action for Appointment of Receiver in English Court — Comity of Courts Discussed.

Motion for the appointment of a receiver. This was an action to dissolve the partnership between the parties hereto and for an order to sell the property of the partners—a gold mining property at Wine Harbour, N.S.—and wind up the business; and was commenced on the 27th of January, 1908. Subsequent to this date one of the defendants in this action commenced an action in England claiming the same relief, and in the latter action a receiver had been appointed. The question on this motion was whether or not a receiver could be appointed in the Nova Scotia Court.

Gregory, K.C., for the motion.

Ritchie, K.C., contra.

TOWNSHEND, C.J.:—I think a receiver should be appointed in this case. I do so for several reasons. It is evident the business of the company cannot be successfully carried on with the members so far apart as to what should be done, and the fact not denied that the present working is carried on at a loss to the company. Then there are the disagreements and dissensions between the partners, and it is evidently in the interests of all concerned that it should be wound up and the property sold. Again, a case for a receiver must have been made out to the Court in England when that Court, on the application of the defendants, ordered a receiver. This brings me to the question of whether I should

order a receiver after one had already been appointed by the English Court. This I regard as a question of conflict of jurisdiction, and as the action of the plaintiff was begun in this Province more than a month before it was commenced by defendants in England, this Court first obtained jurisdiction and cognizance of the matter in litigation, and it cannot be ousted by the action of a foreign Court. No doubt had the defendants first commenced action in England, and a receiver appointed, this Court, as a matter of courtesy, would respect what had been done. That is not the case here. See on this subject *Ency. Pleading and Practice*, vol. 12, page 151. Therefore I decide to grant the order. I will hear both parties on Friday, 27th, at Chambers, as to the receiver to be named.

EDITOR'S NOTE.—In the English action, *Jopson v. Hall and Antrobus*, the Vice-Chancellor in the Palatine Court, granted, on interlocutory applications, orders appointing a Receiver, and an injunction restraining Hall from proceeding in the Nova Scotia action. From these orders Hall appealed. The judgment of the Court of Appeal discharging these orders is interesting on the point of jurisdiction when actions for the same cause are commenced in a Court of concurrent jurisdiction. The following is a transcript of a stenographic report of their lordships' reasons:—

JULY 2ND, 1908

THE MASTER OF THE ROLLS:—This litigation is very unfortunate and, in my view, it raises questions of wider importance than those affecting merely the plaintiff and the defendants—it raises a question as to the mode in which a Court in this country ought to have regard to proceedings dealing with the same subject matter in a Court in a British colony possessing an appeal to the Privy Council in this country. Before dealing with the facts of this case, I, for myself, desire to say that I think every English Court ought to be extremely careful not to infringe upon the jurisdiction of a colonial Court in a proceeding commenced before any proceedings were commenced in England, relating to land in the colony and relating to land in the colony which probably was not subject, strictly, to a partnership agreement, but was merely subject to an agreement between the parties in their character of co-adventurers and probable owners—they may have been partners and that is why I say “probable owners.”

With these preliminary observations I will endeavour to state, as briefly as I can, how the questions arose. There were four gentlemen who were interested in a mine in Nova Scotia, and nothing else but this mine in Nova Scotia—Mr. Jopson, Mr. Antrobus, Mr. Hall, and Mr. James. I assume in favour of the respondents here that all the parties who signed the documents creating the relations between them were resident in England; in my view that is so, but it is an irrelevant fact. Shortly after these agreements were entered into, Mr. James went to Nova Scotia, and he, although a domiciled Englishman, is resident in Nova Scotia—he has been the resident manager of the mine there. The mine was not proving as profitable as the parties anticipated. Mr. Hall thought that Mr. James was to blame in the matter. Nothing that has been read to us renders it necessary for me to say whether Mr. Hall's view of Mr. James' conduct was or was not well founded. I do not base my judgment in the least upon that; but as I do not hold that Mr. James is shown to have been guilty of any improper conduct, I think it is only reasonable and right to say that nothing I have heard or read in the present case brings me to think that Mr. Hall has been guilty of anything which is dishonourable or discreditable; and I cannot help regretting that the Vice-Chancellor, in some interlocutory observations, seems to have made some remarks with reference to Mr. Hall which might tend to discredit him.

Now in January, 1908, Mr. Hall, who I think then was in Nova Scotia temporarily, commenced an action in the Nova Scotian Court, a Court plainly of competent jurisdiction, against Mr. James, who was resident there, and Mr. Antrobus and Mr. Jopson, who were resident in this country, and asked for a dissolution, accounts, and sale; and either expressly asked for the appointment of a receiver, or at least asked for relief which would justify, beyond all doubt, the Court in appointing a receiver. Now what did two of the defendants do? Mr. James, of course, was there and appeared, but Mr. Antrobus and Mr. Jopson, on the 11th February, appeared in Nova Scotia to the writ, and the following day a statement of claim was delivered in the Nova Scotian action, asking substantially for the relief which one ought to expect to find in an action of this kind dealing with the nature of the transactions.

Now it is said, and I have no doubt it is true, that money was urgently needed at that time to prevent the possibility of forfeiture of the mine. Nothing is more clear or more certain than that it was open to the parties who had appeared in the Nova Scotian action, if they were so minded, to have applied for a receiver and get the order which the Courts are in the habit of making, or providing for the necessary advance in the nature of salvage; and any person who advances money, whether one of the partners or not, has a first charge on the assets. That was not done, but on the 25th February, Mr. Jopson, with full knowledge of the Nova Scotian proceedings, to which in fact he appeared, commences an action in the Palatine Court against James, Hall, and Antrobus, asking for the same relief as had been asked for in the Nova Scotian action. Mr. James, though resident in Nova Scotia, at once appeared to that action in the Palatine Court, and on the 5th March notice of motion for a receiver and a manager was given. That notice of motion did not come on effectively until the 16th March. In the meantime, to the knowledge of the parties, notice of motion for a receiver had been served upon the parties through their solicitors in Nova Scotia. That was brought to the knowledge of the Vice-Chancellor, but the Vice-Chancellor, with notice of the prior pending action in Nova Scotia, and with notice of a pending motion for a receiver before the Court in Nova Scotia, thought fit to make an order on the 16th March appointing a receiver and manager of the property. He appointed an accountant in Manchester, or Liverpool, and gave him liberty to appoint his agent in Nova Scotia; and the first thing that the agent did was to appoint Mr. James his agent in Nova Scotia. I do not blame the receiver for doing that. I make that remark from the facts which arose in the course of the case.

Now the matter came on in Nova Scotia before the Chief Justice. He was informed that the Palatine Court had thought fit to appoint a receiver. We have had the judgment of the Chief Justice read to us, and if I may be allowed to say so, his judgment seems to me to be absolutely dignified in form and correct in substance. He, dealing with an action first in his own Court dealing with land in Nova Scotia, though fit for reasons which he assigned, and with which I agree, to appoint a receiver in Nova Scotia of this property; and to make the matter still more straight, when it came on

I think a few days afterwards to fix the individual who should be appointed, Jopson, Antrobus and James, who were all present, asked him to appoint Mr. James receiver in the Nova Scotian action, of course on terms of giving security and acting in obedience to the Court. From that time forward Mr. James was in a very remarkable position. He had accepted the position of agent of the English receiver, and he had accepted the position of receiver himself under the Nova Scotian Court, and he had done that not adversely to Jopson and Antrobus, but at their request and with their support. Now after that a statement of claim was delivered in the Palatine Court. It is a remarkable statement of claim. We had an argument from Mr. Norton (which he had, if he will allow me to say so, some difficulty in presenting to us) that an order made upon the summons for preliminary accounts of the 16th March was really a decree in the action. Of course it was not. The plaintiff delivered a statement of claim asking for relief, and asking amongst other things that the defendant Hall should be restrained from proceeding—I will take the exact words—"That an injunction may be awarded to restrain the said Frederic Hall from prosecuting or continuing the prosecution of the said proceedings in Nova Scotia." That came on before the Vice-Chancellor on the 26th May, and the Vice-Chancellor thought fit to grant the injunction and to make the order, and that is one of the orders that is appealed from to-day.

Now to restrain a plaintiff who has first commenced an indubitable action in a Court having indubitable jurisdiction in the matter is a very, very strong thing to do; but it so happened on that very same day—I care not whether a few hours before or a few hours after—the Nova Scotian action came on for trial, and the learned Judge in Nova Scotia made a full and proper partnership decree—if it be a partnership decree—or judgment for winding up (if not a partnership), the co-adventure, if it be a co-adventure. That was made in the presence and in the hearing of all the parties to the action; so that on one and the same day you have an order by the Vice-Chancellor of the Palatine Court granting an injunction restraining Hall from continuing the proceedings in Nova Scotia, and also the Nova Scotian Court granting full relief to the plaintiff Hall in that action. That being so, it was a state of things which was absolutely—I am not going to say intolerable—but a state of things which I think it

would be disgraceful to allow to continue, and the defendant Hall taking that view, applied by summons before the Vice-Chancellor to stay the proceedings in the Palatine Court on the ground that in a suit in Nova Scotia asking for the same relief between the same parties, a decree had been made giving full relief. The Vice-Chancellor, when that came on, thought fit to dismiss the summons to stay, and he dismissed it with costs.

Now in that state of things, what is our duty? I think our duty is to see that the Nova Scotian Court is left practically free to administer justice in the Nova Scotian Court between parties within its jurisdiction and to take care that there is no conflict of jurisdiction; and to further take care that Mr. Hall (against whose conduct, as far as I can see, not one word of blame ought to be attached), shall be in no risk of having an attachment or being in contempt.

I think we can obtain that result only by, in the first place, discharging the order of the Vice-Chancellor appointing Mr. Blakeley, the English receiver. We must then discharge also the order of the Vice-Chancellor of the 26th May, which granted an injunction to restrain Mr. Hall from proceeding in Nova Scotia; and we must dismiss the order of the 2nd June by which the Vice-Chancellor refused Mr. Hall's application to stay proceedings in the Palatine Court; and we must make an order on that summons staying further proceedings in the Palatine Court.

In discharging the order for the receiver, I see no objection to inserting the words which will give effect to that to which Mr. Hughes most properly assented, namely, the condition that the monies, which were in fact advanced by Mr. Jopson and Mr. Antrobus, should be a first charge upon the partnership assets. I am by no means sure that that is necessary, but to avoid any question or discussion let that be inserted.

Then there comes the serious question of costs. As to the costs of the appeal here, I am quite clear that the appellants should have their costs. I think they must have their costs also of the summons to stay, the costs of which they were ordered to pay, and I think they must also have the costs of the notice of motion for an injunction. I am not quite sure whether they were ordered to pay those costs; if they were, and they have been paid, they must be refunded.

LORD JUSTICE FARWELL:—I entirely agree. The existence of concurrent jurisdiction renders very necessary the observance of a comity between those jurisdictions the disregard of which would really lead to most unfortunate friction. Two points appear to me to be usual on considering whether you should have regard and defer to a jurisdiction with which you may come in conflict, or whether you can expect that other jurisdiction to defer to you. One is priority in time, the other is the extent of the relief asked for or obtainable in the other jurisdiction.

Now in the present case there is really no question that the comity between two conflicting jurisdictions ought to have been exercised by the Vice-Chancellor in favour of the Nova Scotian Court. The writ in the Nova Scotian Court was considerably prior in time, and the statement of claim also. The relief asked was co-extensive, and the relief obtainable was found more effective because the Court there could act in rem as to real estate, or order it to be sold or not. The nature of the contract between the parties also in my opinion is another reason for saying that the Nova Scotian jurisdiction is to be preferred. It is a contract of a peculiar nature under which one adventurer is to go out and try to obtain mining rights—mining properties—which he is then to work for the benefit of the other co-adventurers and himself, and then they are after having tested and discovered whether the mines are or are not payable, to attempt to form companies for the purpose of giving the British public the benefit of their discoveries. These are matters which, so far as the parties and working of the mines in Nova Scotia are concerned, are better dealt with in Nova Scotia, because the working is there, the accounts of that working are there, and the man liable to account as managing owner, who is working the mine there, is there still.

On all these grounds I arrive at the conclusion that the Palatine Court ought to have deferred to the jurisdiction of the Nova Scotian Court.

Now we have had cited to us a decision of Lord Cottenham's, than whom I suppose no greater judge ever sat in Chancery. In my view that really bears out what I have said, rather than the argument of Mr. Norton which it was intended to support. In the case of *Bunbury v. Bunbury*, (3 Jurist 644) Lord Cottenham says, and, of course, I need hardly say I entirely agree: "Certainly this Court is

as competent, wherever the parties are situate, to decide on a question of that sort as a Demerara Court can be." With that I quite agree. This Court does deal with all sorts of questions, and, if necessary, could have decided any question that would have arisen, as far as I know in the present case. Then he goes on: "But there is another circumstance in this case,"—I pause there to say that the Lord Chancellor does not say "more" competent, he only says "as" competent—"but there is another circumstance in this case. It is admitted as to another question—this Court must come to an adjudication as to personal property," and so on, That case was a very complicated case, and I need not read the whole of the judgment; but the gist of it is this: The English Court is as competent as the other. In that particular case there is a particular relief asked which the English Court can alone dispose of, and that being so it is better in the interests of the parties that the Court which is competent should dispose of the whole subject matter in dispute between the parties—I think there was some question arising under a will—rather than the Colonial Court in which some action to recover land was commenced. Speaking for myself, I do not see that that helps Mr. Norton in any way.

The result is throughout this case, in the proceedings, the Vice-Chancellor ought to have refused in the first instance, directly his attention was called to the fact that there was a properly constituted action pending in a colony (and more especially when his attention was called to the fact that there was a pending motion for a receiver there), to have declined to interfere in any way with the jurisdiction of that Court; and, in fact, I think I read one passage from his own judgment which seems to me is against himself rather than in support of the view that he has taken.

In the result I entirely agree with the order proposed by the Master of the Rolls.

LORD JUSTICE KENNEDY: I am entirely of the same opinion, and I shall say nothing with regard to the details of the case, or the details of the order, which will be the order of this Court. But I do desire to say this—that it seems to me that nothing can be more important for the public weal than that there should not be, wherever it can be avoided, an apparent, and still less a real, clashing of jurisdiction between two competent tribunals. I am not saying—nobody

has said—that this Court, the Palatine Court, was not a competent tribunal; but it is found when this action was first initiated that, at least an equally competent tribunal, and certainly more convenient forum, had already seized, if I may call it so, of the disputes between the parties as to their conflicting rights, and as to the working out of those rights in relation to the property in which they were all interested. If ever there was a case, as it seems to me, in which a Court here ought to hold its hand on finding that another Court, and a competent Court, has already got seized of the matters, and the same matters and the same claim in character for relief before it, it is where the real subject of the litigation is the disposition of landed property, which is within the jurisdiction of that other forum. A clashing of orders (if such a thing were possible), between the tribunal here and the tribunal there is obviously more inconvenient, and more serious in its complications and difficulties, than when you are merely dealing with complicated claims of a pecuniary nature, because you have got ultimately to dispose of this property; you exercise your jurisdiction in authorizing, it may be, the sale of this property, and I cannot conceive anything more inconvenient than the possibility (if the two jurisdictions continue to coexist actively) that one forum should hold one opinion and the other another, as to the proper way of dealing with the property which is situate within the jurisdiction of one of them. In this case, apart from the inconvenience, I do attach myself great value to a perfect exercise of comity in these matters. In this case the Vice-Chancellor finds, when the case was first brought before him, that the Colonial Court—the High Court of that district with a right of appeal to the Privy Council in this country—was dealing with the rights of the parties in a matter in which practically the same questions were at issue in which both Courts would give equal relief, and in which the property concerned, as well as one of the litigants, was within the jurisdiction of that other Court in which all the parties were already appearing without objection to the jurisdiction; and I regret that we come to the conclusion (I say it with great respect) that the Vice-Chancellor did think it was right from the first to proceed in his own Court; and not only that, but at a certain stage to grant an injunction against the plaintiff in the foreign Court from pursuing that

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which at any rate was the more natural and at least equally convenient jurisdiction.

It seems to me that the order which has been pronounced is perfectly right, and that any other order would have been to my mind not one which would have followed out well recognized, and not only well recognized, but, in my humble judgment, most important principles of administration of justice where questions of this kind arise.

I also think that I should say what the Master of the Rolls has already said—it is only fair to Mr. Hall that I should say that I can myself see no ground for imputing anything to him but that which was consistent with honour.

Lord Justice Farwell: I desire to say the same. I certainly see no ground for the Vice-Chancellor imputing anything discreditable to Mr. Hall.

Mr. Hughes: Your Lordships have discharged the order of the 16th March for a receiver?

The Master of the Rolls: The order giving special relief?

Mr. Hughes: Yes, I did not mean that consent to go quite to this—that I consent to everything advanced in the matter to Mr. James was to be allowed to my friend's clients. There has been a very great deal expended before.

Mr. Norton: Quite so.

Mr. Hughes: On behalf of the partnership really. Any moneys advanced by Jopson and Antrobus to Mr. James and properly expended are to be a first charge on the assets.

The Master of the Rolls: That is it.

Mr. Hughes: Then as to the costs I understand as regards the costs of appointing the receiver there are no costs of the appeal on that. The costs of the receivership order of the 16th March will be costs in the action?

The Master of the Rolls: Yes.

Mr. Hughes: And as regards the costs of the 26th May and 2nd June orders, we get the costs here of the appeal and below.

The Master of the Rolls: Yes.

Mr. Hughes: With regard to the costs of the action, your Lordships propose to leave those to the Vice-Chancellor, but I submit under the circumstances it would be right they should be dealt with now rather than go back to the Vice-Chancellor. What I was going to say is this—

Lord Justice Farwell: There is nothing on appeal for us to deal with. We are staying all further proceedings,

but we are not dealing with the costs as regards the action.

The Master of the Rolls: Did your summons in the order refused on the 2nd June ask anything about costs?

Mr. Hughes: I am afraid it did not.

Lord Justice Farwell: Then I do not think it is before us.

Mr. Hughes: If your Lordship pleases. Then as to costs of the action?

The Master of the Rolls: We stay all proceedings, but to avoid any question you have liberty to apply to the Vice-Chancellor as to the costs of the action.

Mr. Hughes: If your Lordship pleases. Could not your Lordships go this far really—say at all events that the costs subsequent to the summons ought to be paid to my client. That is a matter before your Lordships.

The Master of the Rolls: There have been no costs of that summons. We can hardly give you the costs of that summons.

Mr. Hughes: If your Lordship pleases; I must leave it there. There must be liberty to apply to the Vice-Chancellor as to the costs of the action?

Mr. Maberly: Will your Lordships make one order on both appeals?

The Master of the Rolls: Yes, one order.

Mr. Hughes: The order for costs is against all the respondents, I apprehend. My friend Mr. Maberley's clients have supported my friend, Mr. Norton.

The Master of the Rolls: Yes.

QUEBEC.

COURT OF KING'S BENCH,
CRIMINAL SIDE.

OCTOBER 7TH, 1908.

COUTURE v. PANOS.

*Sunday Observance Acts—Violation — Selling Goods —
Validity of Provincial Legislation — Dominion Act—
Qui Tam Action—Procedure.*

HUTCHINSON, J.:—The defendant has been found guilty by the District Magistrate of violating the observance of Sunday by keeping open his place of business for trade, pur-

suing his calling, and selling wares and merchandise for gain on Sunday, the 14th day of June, 1908, and has been adjudged to pay the sum of \$10 and costs, and, in default of payment thereof, that he be imprisoned in the common jail of this district for the space of thirty days. From this conviction an appeal has been taken to this Court. When the case came up for trial before the district magistrate a preliminary plea was filed by which exception was taken to the jurisdiction of the magistrate's court on the following grounds: (1) Because the Parliament of Canada alone has jurisdiction to legislate regarding the observance of Sunday, and that the provincial statute 7th Edward VII., chap. 42, regarding Sunday observance was, and is, ultra vires of that Legislature; (2) Because even if the provincial legislature had authority to legislate on such matters the present proceedings should have been authorized by the Attorney-General, which was not done; (3) Because an affidavit which should accompany a *qui tam* action has not been furnished as required by law.

It is true that in 1906 the federal Parliament passed an Act known as the Lord's Day Act regarding Sunday observance, which was assented to on the 13th of July, 1906, and which came into force on the 1st of March, 1907. This Act is of a very general character. Section 5 thereof provides that "it shall not be lawful for any person on the Lord's Day to sell, or offer for sale, or purchase any goods, chattels or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling; or in connection with such calling; or for gain to do or employ any other person to do on that day any work, business or labour." Then there follows in succeeding clauses provisions regarding employees engaged in receiving or transmitting telegraph and telephone messages, or in the work of any industrial process, or engaged in any public game or contest for gain, conveying persons for amusement and pleasure, using guns, and the selling and distributing of foreign newspapers, etc. In limitation of these general provisions there are a great many exceptions under the head of "works of necessity and mercy." Then under the head of "procedure" it is provided that "nothing in this Act shall be construed to repeal or in any way affect any provision of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when this Act comes into force."

And, further, no action or prosecution for the violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed.

Immediately before this Act came into effect, to wit, on the 28th of February, 1907, the Legislature of this province passed an Act, chap. 42, which virtually re-enacted, or at least declared to remain in force, the existing law in regard to the sale of goods on Sunday, which law then existing is to be found in section 3498 of the Revised Statutes of Quebec, which prohibits, with certain exceptions, the sale of goods, wares and merchandise during Sunday. And by a second clause of this Act of 1907, it is provided that "no person shall on Sunday for gain, except in cases of necessity or urgency, do any industrial work or pursue any business or calling, or act or organize any theatrical performance." And, further, this Act provides that every offence against this Act shall be punished by a fine of not less than \$1 and not more than \$40, and in default of payment thereof by imprisonment not exceeding thirty days. This Act also provides that the fine shall belong to the Crown, and can be recovered only by a British subject. And by the last clause it is declared that nothing in this Act shall restrict the privileges granted or recognized by the federal Act.

Now, among the subjects mentioned in our Constitution (The British North America Act of 1867), which the federal parliament has the exclusive right to legislate upon, there is the criminal law, including procedure in criminal matters; and among the subjects set apart regarding which the provincial legislatures have the right to legislate upon, is property and civil rights in the province, and the right to impose punishment by fine, penalty or imprisonment for enforcing any law in the province.

Questions have frequently arisen as to the dividing line between these two jurisdictions, and appeals have been taken to the Privy Council to determine this line of division, and it has been decided: (1) In the case of *Hodge v. The Queen* (9 App. Cas. 117), that the subjects which in one aspect and for one purpose fall within section 92 of the British North America Act (which gives the subjects for federal legislation) may in one aspect and for another purpose fall within section 91 of this Act, which gives the subjects for provincial legislation. And, later, in the case of the *Grand Trunk Railway Company* and the *Attorney-General of Canada*

[1908] A. C. 65, it was stated that: (1) "That there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear, and (2) that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail," the federal Parliament having the exclusive right to legislate upon all matters not specially assigned to the provincial legislatures.

Now, both the federal Parliament and provincial legislature have legislated in regard to this matter of Sunday observance. The question, therefore, is, was the field clear for the provincial legislature of this province to legislate to the limited extent it did on the 28th of February, 1907, the day before the Dominion Act came into force? On referring to the Hansard debates in Parliament, session 1906, volume 3, page 5,622 and following, it will be seen that the object of the legislation by the federal Parliament in 1906 was by reason of the Supreme Court, as well as the Privy Council, having declared that the Act of the Ontario Legislature, or one similar in its terms to it, regarding Sunday observance—a very comprehensive Act—was treated as a whole *ultra vires* of the provincial legislature, and it was considered desirable that there should be an uniform legislation throughout the whole of the Dominion of Canada respecting this matter of Sunday observance. But it was generally admitted by lawyers on both sides of the House that the provincial legislatures could legislate to some extent in regard to Sunday observance. In *Ex p. Greene* (35 N. B. R. 137), the Supreme Court of New Brunswick declared that the New Brunswick statute respecting the profanation of the Lord's Day was *intra vires* of the provincial legislature, and is to be classed as a police or municipal regulation, and not as a matter essentially appertaining to the criminal law and so within the sole competence of the Parliament of Canada. Therefore, to use the language of one of their Lordships of the Privy Council, was "the field clear" for the provincial legislature of Quebec to pass the Act 7th Edward VII., chap. 42, above referred to, under which Act it seems evident that the present action was taken? On referring to the Dominion Act of 1906, it will be seen that in every important clause of this Act special reservation is made in favour of the provincial Acts. The language employed is: "It shall not be lawful for any person on the Lord's Day, etc., except as provided herein, or in any pro-

vincial Act or law now or hereafter in force." And then, in section 16 of this Dominion Act, under the heading "Procedure," it is provided, as above mentioned, that "nothing herein shall be construed to repeal or in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when this Act comes into force."

Here is an express declaration that not only shall all provincial laws regarding this matter remain in force, but any new law that the provincial legislature may pass before the 1st of March, 1907, shall remain in force. The Dominion Parliament not only yields a clear field to the provincial legislatures, but impliedly invites that legislature to occupy it if such legislature wishes to do so; and, in view of this legislation, the Quebec local Act was no doubt passed. Under these circumstances, can it be contended that this Act is now *ultra vires* of that Legislature? I cannot think so.

As to the second contention of the defendant, that even if the provincial legislature had the authority to pass this Act the present action should have been authorized by the Attorney-General, if the present prosecution had been taken under the provisions of the Dominion statute the consent of the Attorney-General would certainly be required, but it is evident that it is not taken under that statute, but under the provincial statute, and under it no such consent is required.

As to the third contention, that this prosecution is of the nature of a *qui tam* action and that an affidavit should have been furnished, this contention could only apply, if at all, when the proceedings are instituted under the old law as found in our revised statutes, and, therefore, this contention cannot be sustained.

There was also a further contention urged before this Court that the provincial statute, under which this prosecution was instituted, provided that the fine could only be recovered by a British subject, and that there was no mention made in the information and complaint that the prosecutor was a British subject, although, in the evidence before the magistrate, it is proved that he is a British subject. In the first place it is evident that the offence is completely stated in the information and complaint. It is only in the procedure that it is necessary that the prosecutor, in order

to recover the fine and punish the defendant, should be a British subject; that is, although the defendant may be guilty of the offence, yet he could not be punished unless the prosecutor was a British subject. In any event, section 578 (old numbering) of the Criminal Code governs a case of this kind. It provides that "No irregularity or defect in the substance or form of the summons or warrant and no variance between the charge contained in the summons or warrant and charge contained in the information or between either and the evidence adduced on the part of the prosecution at the inquiry, shall affect the validity of any proceeding at or subsequent to the hearing."

I am, therefore, of the opinion that the proceedings, as taken, are valid, and that the conviction of the complainant should be maintained, and the appeal is dismissed with costs.

EXCHEQUER COURT OF CANADA.

OCTOBER 7TH, 1908.

PRINCE EDWARD ISLAND ADMIRALTY DISTRICT.

MAGDALEN ISLANDS STEAMSHIP COMPANY, LIMITED v. THE SHIP "DIANA."

Shipping — Collision—Fault of Plaintiffs—Damages—Report of Registrar and Merchants—Rule for Assessment of Damages—Demurrage.

W. S. Stewart, K.C., for plaintiffs.

Fred R. Taylor (of the New Brunswick Bar) for defendants.

SULLIVAN, C.J.—This is a proceeding in objection to a report of the Registrar and merchants in a cause for the recovery of damages in respect of a collision which took place on 26th September, 1906, in the Gulf of Saint Lawrence, between a Steamship called the "Amelia," owned by the plaintiff company, and a sailing vessel called the "Diana." For the purposes of this proceeding it is sufficient to state that there was a counterclaim on behalf of the Diana for damages occasioned to her in the collision by the

Amelia. The Court found the Steamship *Amelia* alone to blame for the collision, and condemned the plaintiffs in damages, directing that such damages should be assessed in the usual way by the Registrar and Merchants. (See 3 E. L. R. 158).

The *Diana* was a fishing vessel, whose home port was Gloucester, Massachusetts, and at the time of the collision she was engaged in seining mackerel off the coast of Prince Edward Island.

The claim for damages on behalf of the *Diana* comprised two sums, namely, one sum for repairs, amounting to twelve hundred and eighty-six dollars and thirty-two cents (\$1,286.32) and another for demurrage and loss of fishing amounting to nineteen hundred dollars (\$1,900). The Registrar and merchants have allowed on the account for repairs, ten hundred and seven dollars and thirty-one cents (\$1,007.31), and on the claim for demurrage and loss of fishing seven hundred and fourteen dollars (\$714).

Both parties moved the Court to vary the report of the Registrar and merchants, the plaintiff company on the ground that the sum allowed to the defendant is too large, and the defendant on the ground that their whole claim should have been allowed to them.

The questions to be disposed of by me now are, whether the whole amount claimed was properly due, or whether all the deductions made by the Registrar and merchants in their report are justified by the evidence, and if not all, to what extent the deductions ought to be supported. The recognized rule for the assessment of damages in cases of collision is thus stated by Dr. Lushington in his judgment in the case of "*The Iron-master*," (Swab. at p. 443):—

"The fundamental principle in determining the measure of damages in all these cases of collision is that the party to blame is considered a wrong-doer, and the party injured is entitled to *restitutio in integrum*, to full and complete indemnity for all the losses sustained."

The duty of the Court in considering an application such as that now before me, is laid down by Dr. Lushington in his judgment in the case of *The Clyde* (Swab. at p. 25), in these words:—

"I fully admit that it is the duty of the Court, when an objection is taken, to look narrowly to the whole thing. It is its duty to decide the question by evidence; and it is the duty of the Court, if it wholly disagrees with the

judgment of the Registrar and merchants, to do justice to the parties, and to alter the report they have made."

This brings me to the evidence: Temporary repairs were made to the *Diana* at Souris in Prince Edward Island, and permanent repairs were made to her at Gloucester, Massachusetts.

The deductions made from the accounts for repairs are on those for lumber and for copper paint supplied, and from blacksmith's, rigger's, caulker's and painter's accounts. The Registrar and merchants had before them the evidence of the persons who supplied the materials as well as the evidence of the persons who made the repairs, and that evidence showed that all the goods charged for were actually supplied, that the repairs charged for were all made, that those repairs were rendered necessary by the collision with the *Amelia*, and that the charges are reasonable, proper and just.

The accounts for labour and materials are all sworn to, the affidavit in each case stating that the charge for labour and materials supplied in the repairing of the *Diana* "is a just and reasonable charge, and that the labour and materials represented in the account, to the amount stated therein, were necessary for the purpose of repairing the damage sustained by the *Diana* in the collision with the *Amelia*, in order to restore her to the condition in which she was before the collision."

The receipted vouchers were also submitted to the Registrar and merchants. They are supported by the affidavit of Hugh Parkhurst, of the firm of Hugh Parkhurst & Co., the managing owners of the *Diana*. Mr. Parkhurst saw the repairs being made from day to day, and he swears that he actually paid the several amounts stated in the vouchers; that he knew all the parties therein named; that he had done business with them previously; that they were the persons usually employed at Gloucester to do such work and that they were in every respect reliable and responsible persons. There was also before the Registrar and merchants the evidence of Captain Corkum, of Gloucester, that he was personally acquainted with all these persons and knew them to be reputable and responsible men. There was likewise before them the evidence of Capt. Collins, wreck-master of The Gloucester Mutual Fishing Insurance Company, that the permanent repairs were made under his supervision and "were only such as were made necessary by the

collision and to restore her—the Diana—so far as possible to the same condition in which she was before the collision."

In opposition to the evidence which I have recited, there was produced on behalf of the plaintiff company the evidence of Milus McPhee and Archibald McPhee, two persons who had been employed as carpenters in making the temporary repairs at Souris. I have read their affidavits and have carefully gone over their oral evidence, as well respecting the damage caused to the Diana by the collision, as regarding the propriety of the charges for labour and materials in making the permanent repairs. Milus McPhee was one of the persons who held a survey on the Diana at Souris immediately after the collision, and he signed the report of that survey specifying the damage caused by the Amelia. His affidavit submitted to the Registrar and merchants, is almost wholly at variance with the report that he signed, the affidavit alleging the damage to the Diana to be much less than it is stated in the report. In the report it is recommended that only temporary repairs should be made at Souris. Yet in their affidavits both Milus McPhee and Archibald McPhee swear that they made a "permanent job," while in their oral evidence they swear that the repairs were only temporary. When such is the shifting and unreliable character of the evidence of Milus McPhee and Archibald McPhee in regard to a branch of the inquiry concerning which they might reasonably be expected to possess accurate knowledge, their evidence on points outside the sphere of their knowledge or observation should be entitled to little consideration. As regards the labour and materials employed in the permanent repairs made at Gloucester, their evidence is to my mind utterly valueless. It is comprised for the most part of estimates and conjectures which should not be held to weigh against the positive testimony of persons who were on the spot, who saw the damage that was done to the Diana in the collision when that damage was exposed preparatory to, and in the course of making the repairs, who saw the repairs being made, knew what materials were supplied, and possessed a knowledge of the proper charges for materials and labour, not as they would or might be at Souris or elsewhere in Prince Edward Island, but as they really were at Gloucester, Massachusetts, in the winter of 1907.

Disposing of this question as I am bound to do, according to judicial principles, I have come to the conclusion that there has been produced on behalf of the Diana sufficient *prima facie* evidence to support the whole claim for repairs, and that no evidence has been produced on behalf of the Amelia sufficient to rebut it. My mind is quite free from doubt upon this point, but even if I entertained a doubt, adopting the principle laid down by the Court in the case of *The Egyptian* (10 L. T. N. S. 910), that the claimant "in all cases of doubt ought to have the benefit of that doubt against a wrong-doer," I should still have to find in favour of the contention on behalf of the Diana.

There is no evidence before me and there was no evidence before the Registrar and merchants tending to shew that the claimants in this case acted otherwise than reasonably and honestly, in repairing the injury inflicted upon their property through no fault of their own, and such being the fact clearly established by positive evidence on behalf of the Diana, it appears to me that the principle recently propounded in the House of Lords by the present Lord Chancellor in the case of *Lodge Holes Colliery Company Ltd. v. Wednesbury Corporation* (1908, A. C. at p. 325) as one that should govern Courts of Justice in dealing with cases of this nature, is peculiarly applicable. Lord Loreburn in that case said:

"Now I think a Court of Justice ought to be very slow in countenancing any attempt by a wrong-doer to make captious objections to the methods by which those whom he has injured have sought to repair the injury. When a road is let down or land let down, those entitled to have it repaired find themselves saddled with a business which they did not seek, and for which they are not to blame. Errors of judgment may be committed in this as in other affairs of life. It would be intolerable if persons so situated could be called to account by the wrong-doer in a minute scrutiny of the expense, as though they were his agents, for any mistake or mis-calculation, provided they act honestly and reasonably. In judging whether they have acted reasonably, I think a Court should be very indulgent and always bear in mind who was to blame."

Viewing the question involved in the light of the doctrine thus laid down by the Lord Chancellor and having regard to the evidence adduced, I am constrained to vary the report

of the Registrar and merchants by allowing the whole claim of \$1,286.32 for the repairs to the Diana.

The next item is the claim for demurrage and loss of fishing. The Registrar and merchants do not state in their report the principle they adopted which led them to allow seven hundred and fourteen dollars (\$714) for this claim. It appears that the Diana was laid up at Souris undergoing temporary repairs for eight days. The evidence of Capt. Corkum, master of a fishing schooner called "Priscilla Smith," is that during those eight days he caught about sixty-five barrels of mackerel in the locality in which the Diana had been fishing previously to and at the time of the collision, and that he sold the fish then caught in Boston at thirty dollars (\$30) a barrel. Hugh Parkhurst in his affidavit in support of the Diana's claim says: "Taking said other schooner — the Priscilla Smith — as a standard I estimate the loss sustained by the said schooner Diana, owing to being laid up at Souris effecting such temporary repairs, at nineteen hundred dollars (\$1,900)."

On the assumption that a vessel at the time and in the place mentioned might have failed to catch any fish, half of what Capt. Corkum caught would probably be a not unfair average catch, and deducting the incidental expenses from the sum that would thus be realized the amount of seven hundred and fourteen dollars (\$714) assessed for this item by the Registrar and merchants, is perhaps a not unreasonable approximation to the amount of the Diana's loss. I therefore confirm it.

The next question is regarding the interest. The Registrar and merchants have allowed interest at five per cent. (5%) on \$1,721.31, the total amount assessed by them, from the date of the collision, namely, the 26th September, 1906. Whilst I am not disposed to interfere with the rate of interest which they have allowed, I am unable to adopt their view with regard to the amount on which and the time from which that interest should be calculated. In accordance with the principle applicable in such cases and usually adopted, I vary their report by allowing interest at five per cent. (5%) on the amount found for demurrage and loss of fishing, viz., \$714 from 26th September, 1906, and on the total cost of the repairs, viz., \$1,286.32, from 21st March, 1907, the date on which it appears that the principal part of the latter sum was paid.

In the report of the Registrar and merchants the opinion is expressed that each party should pay their own costs of the reference. I am unable to accede to that view. I direct that the plaintiff company shall pay all the costs of the reference. My decree will therefore be: That the amount of seven hundred and fourteen dollars (\$714) allowed by the Registrar and merchants for demurrage and loss of fishing be confirmed and allowed, with interest thereon at five per cent. (5%) from 26th September, 1906. That the whole amount of the accounts and vouchers for repairs, namely, twelve hundred and eighty-six dollars and thirty-two cents, be allowed with interest thereon at five per cent. (5%) from 21st March, 1907, that the plaintiff company shall pay all the costs of the reference and all the costs of the applications to vary the report of the Registrar and merchants.

Decree accordingly.

NOVA SCOTIA.

IN THE SUPREME COURT.

LONGLEY, J.

OCTOBER 12TH, 1908.

SMILEY v. CURRIE.

Debtor and Creditor—Judgment — Execution — Defective Process—Discharge of Debtor out of Custody—Action of Escape against Sheriff—Damages.

B. S. Graham, for plaintiff.

W. C. Robinson, for defendant.

LONGLEY, J.:—The facts in this case are simple and undisputed. The plaintiff, Smiley, recovered in the County Court, District No. 4, a judgment against one John Blackburn, for \$32.93, debt and costs, and took proceedings against Blackburn under the Collection Act. He was ordered by the commissioner to pay \$5 a month. He failed to comply with the order, and the commissioner ordered the issue of an execution against him under the terms of the Act. The

execution was issued and placed in the sheriff's hands with instructions to take the body. The sheriff made the arrest under the execution, the original of which I annex, on a certain Saturday. After Blackburn was lodged in gaol, his solicitor discovered that Blackburn's name was omitted from the preamble of the execution, which sets forth that on a certain date judgment was recovered in the County Court against The directory part of the execution requires the sheriff to "take the body of the said John Blackburn and commit unto our gaol in your bailiwick, and detain in your custody within our said gaol until he pays the full amount due on the judgment . . . or that he be discharged . . . according to law."

The said solicitor claimed that owing to this blank in the preamble of the execution it was absolutely void and Blackburn must be set at liberty at once. The sheriff then went to plaintiff's solicitor who claimed that the writ was all right, but did not offer to indemnify him. The sheriff thereupon, on his own responsibility, set Blackburn at liberty. The plaintiff now brings action against the sheriff for an escape.

It is with regret that, after a careful examination of the authorities, I have come to the conclusion that I must find for the plaintiff. I am satisfied the sheriff acted in good faith, but under an entirely erroneous conception of his duty. The execution, in my view, notwithstanding the blank in the preamble, was ample to justify him in holding the prisoner. I am not called upon to say whether the prisoner might have been released under a writ of habeas corpus, or whether, on application, an amendment might have been ordered by the Court. All I have to decide is that the writ was amply sufficient to justify the sheriff in holding his man, and the omission in the preamble was no justification for releasing the prisoner. I have carefully examined the case of *Morgan v. Bridges*, reported in 1 B. & Ald. 647, but it seems to me the circumstances are entirely dissimilar. In that case the sheriff in his writ was directed to take Godfrey, whereas he in reality took Maurice. As a matter of fact Maurice was the right man, and if the sheriff had held him he would have been upheld. But the Court decided that the sheriff was not bound to take the risk, and was therefore not amenable to an action for escape for letting Maurice go as soon as he discovered that he was not Godfrey. That

principle might be applied if the sheriff in this case had discovered that he had arrested the wrong man. But nothing of the kind occurred here. The sheriff was commanded to take John Blackburn, and keep him safely, and because there was an omission in the preamble seems to me no justification for letting Blackburn escape.

The only question is damages. The defendant did not give any direct testimony as to the financial position of Blackburn from which to judge how much loss the plaintiff sustained by his release. But, by consent, all the papers in the proceedings before the commissioner under the Collection Act were put in evidence, and from these I think I am at liberty to draw the inference that Blackburn was without property and in debt, though earning \$35 a month. He had a large family of children, and seems to have been always behind financially, and not likely to pay this debt, even under the exacting provisions of the Collection Act. I think, therefore, the escape was of trifling injury to plaintiff, and only calls for nominal damages, which I fix at \$10. Judgment will have to be entered for plaintiff for \$10 and costs of suit, which ought to be small as there was practically no evidence, and the trial only occupied a few minutes.

NOVA SCOTIA.

IN THE SUPREME COURT.

DRYSDALE, J., AT HALIFAX.

OCTOBER 6TH, 1908.

EASTERN HAT & CAP CO. v. WALMSLEY.

Patent of Invention—Infringement—Cap with Ear Covering Attached—Novelty — Patentability—Specification—Injunction—Account—Damages.

Action claiming an injunction for an infringement of plaintiffs' patent and damages.

J. J. Ritchie, K.C., and W. B. A. Ritchie, K.C., for plaintiffs.

H. Mellish, K.C., and J. P. Bill, for defendant.

DRYSDALE, J.:—This is an action for an infringement by defendant of a patent granted to Ogilvie & Coulson on the 19th of March, 1907, whereby the patentees were granted the exclusive right of making and vending an invention relating to caps, described in the specification attached to the patent as a new and useful improvement in caps, the object of the invention being to provide a cap containing on its interior an efficient and comfortable covering for the ears which, when turned outwards, and downwards, can be used for that purpose without changing the proper fit of the cap.

The defendant admits making and selling caps such as are described in the specification above mentioned, and insists as his defence that the patent held by the plaintiffs is invalid, that the specification and patent described nothing new or at least nothing that could be properly said to be patentable. In short, that there had been no exercise of invention or inventive faculties by Ogilvie & Coulson, and none described in their application or patent. The question, and the only question therefore before me is, does the specification describe and claim the invention?

Ear coverings attached to the interior of caps and adapted to turn outward were not new at the time of the application for the patent in question. The claim, however, by the plaintiff is that all former coverings when used either destroyed the shape or fit of the cap, or rendered the desired protection ineffective, and that by study, practical designing and ingenuity, the patentees, by the use of a flexible elastic material attached to the inside of the cap, produced a covering that at once was calculated to render the desired protection without destroying the fit of the cap. Much evidence was given by experts in the manufacture of caps relating to the various articles heretofore produced, and given to the public, and shewing the various designs of ear coverings as applied to the interior of caps, and I think it is a fair conclusion that in none of these was the object attained of producing an interior covering which, when turned outward, and downward, could be used efficiently without changing the fit of the cap. It seems to me the distinctive discovery of the patentees here was after various experiments in finding that a flexible elastic material could be used in a particular shape and thus accomplish the purpose. This I think was a new thing in the trade, producing a practical benefit, and can properly be said to be an invention. It seems to have been

a success as regards utility. It was produced by the exercise of skill and ingenuity, and to my mind has the merit of invention.

The plaintiff is entitled to an injunction, and an accounting in respect to damages.

NOVA SCOTIA.

IN THE SUPREME COURT.

LONGLEY, J., AT CHAMBERS.

OCTOBER 5TH, 1908.

SAM CHAK v. CAMPBELL.

*Practice—Writ of Summons—Untrue Address of Plaintiff—
Setting aside Writ—Staying Proceedings until Correct
Address Furnished by Plaintiff.*

Motion to dismiss action for non-compliance with order of Court.

R. T. Macilreith, in support of motion.

W. F. O'Connor, contra.

LONGLEY, J.:—In this case a writ of summons was issued against defendant by plaintiff through his solicitor, Finlay McDonald. The address of plaintiff was endorsed upon the writ of summons, but upon affidavit it was shewn to the satisfaction of Drysdale, J., that the address given was not the true one, and an order was passed by Drysdale, J., staying proceedings until the right address was furnished. After this order an amended writ was served with another address, namely, "Sydney Mines in the County of Cape Breton." On application to Drysdale, J., this address was held insufficient, and proceedings were ordered stayed until the previous order had been complied with. After that the writ of summons was further amended by giving plaintiff's address as follows: "Main Street, Sydney Mines in the County of Cape Breton." The defendant now comes to me with an affidavit of Thomas Collison of Sydney, constable, who deposes that on Monday the 22nd of June, after the second amended summons had been served, he visited Main Street in the town

of Sydney Mines, County of Cape Breton, and made diligent inquiries as to whether plaintiff Sam Chak resided on said street, but could not ascertain where the said Sam Chak resided. He visited the only Chinese laundry on said street and inquired of the Chinaman, proprietor thereof, whether he knew the said Sam Chak, and he informed him that he did not know Sam Chak, and that he (Chak) did not reside or work there. Collison says that from diligent inquiries he verily believes that Sam Chak does not reside on Main Street, Sydney Mines.

The answer to this is by one Wong Yeen, a Chinese student, who says that at the request of plaintiff's solicitor he started out to locate the several Chinamen who have brought actions similar to the one in question against defendant, and that as a result he found Sam Chak at Sydney Mines, and declares that he is a resident there, and resides on Main Street. He admits that Collison's affidavit may be correct, but thinks that Chak is concealing himself from fear. Says Chak is a laundryman and goes from place to place.

Sam Chak on the day of July, in an affidavit states that he is then engaged as a laundryman on Main Street, Sydney Mines.

As I read the affidavit, I am impressed with a strong conviction that another either false or misleading address has been furnished, and that the provisions of Order IV. are being evaded. It seems impossible that diligent search by an officer from one end to the other of Main Street, in Sydney Mines, should fail to reveal some light as to the residence of the plaintiff, if he really resided there or had recently resided there. Chak himself does not venture to say he resides on Main Street, he simply says that he is engaged there in July in laundry work, on said street, and the student merely says he found Chak on Main Street, Sydney Mines, which is perfectly consistent with an entire absence of residence on said street.

I do not feel like setting aside the writ absolutely on this ground. I have not yet found any authority for quite so drastic a step. I think, under the affidavits, I ought to stay all further proceedings until an address which is a substantial and strict compliance with the Act, and the order of Drysdale, J., is furnished, and in view of the repeated applications made in this matter, I think the costs of this application should be paid by plaintiff.

NOVA SCOTIA.

IN THE SUPREME COURT.

LONGLEY, J., AT CHAMBERS.

OCTOBER 9TH, 1908.

R. C. E. CORPORATION v. MACPHERSON.

Practice—Place of Trial—Affidavit of Materiality of Witnesses—Change of Venue—Refusal—Costs.

Motion for a change of venue.

T. R. Robertson, in support of motion.

H. Mellish, K.C., contra.

LONGLEY, J.:—If I could accept without reservation the statement in the defendant's affidavit that fifteen necessary and material witnesses whose names are mentioned were really material and necessary, it is clear that the balance of convenience would be in favour of Sydney as a place of trial. But apart from the misgiving one would naturally have as to the probability of those men having knowledge about a question between a bishop and his priest, touching land which would necessitate, or even justify, their attendance under subpoena, direct evidence is given by Mr. Wall and others that several of those witnesses named have no knowledge concerning the matters at issue; have never been spoken to by defendant or in his behalf, and would be valueless to him as witnesses.

On the other hand, the principal witness for the plaintiff is the Bishop of Antigonish, who is over 83 years of age, and of feeble health. The action arises out of the failure of a priest to obey the orders of his ecclesiastical superior, and must be very largely confined to matters known only to the two contending parties.

In addition, I have to note that the cause is ready for trial at Antigonish, where the Court opens October 13th. The application for a change was made for the first time today. It may be that the effect of a change would be to postpone the trial indefinitely. This would be a serious matter, perhaps, to the plaintiff. I think if defendant was really desirous of a change he should have applied earlier.

I do not ignore the fact that the policy of the law is that the trial should take place at the most convenient place; nor do I give any special weight to the offer made by plaintiff's solicitor in Court to enter into an undertaking to pay all the extra expense the trial at Antigonish might impose upon defendant up to the full extent of his claim of extra expense. I have found no authority for giving weight to this offer, though it seems to me it does constitute a feature in determining such applications. The conclusion I have reached is that the ends of justice will be best served by declining to order a change of venue, and thus jeopardize the plaintiff's right to an early determination of the issue. Costs to be plaintiff's cause in the cause. Plaintiff in his order to discharge order to be subject to undertaking to bear extra costs, not exceeding \$180.

NOVA SCOTIA.

IN THE SUPREME COURT.

DRYSDALE, J., AT CHAMBERS.

OCTOBER 7TH, 1908.

REX v. DUTTON.

RE WOO JIN.

Chinese Immigration Act—Infraction—Deportation before Conviction—Power of Minister of Trade and Commerce.

Argument on the return to an order in the nature of a habeas corpus for the release of Woo Jin, a person of Chinese origin, who was being deported from Canada for a violation of the Chinese Immigration Act.

W. T. O'Connor, for the prisoner.

W. H. Fulton, for the steamship.

The question submitted here is whether deportation can take place under the Chinese Immigration Act by the Minister of Trade and Commerce, before a conviction is had in a court of justice for a violation of the provisions of the Act.

In this case the Chinaman, Woo Jin, is in the custody of the master of the S. S. "Bornu" and being deported by order of the Minister, no conviction having been made against him in the Courts.

The original Act has been amended by c. 14 of the Act of 1908, and by the amendment a person of Chinese origin who lands or attempts to land without the payment of the tax, or in any way attempts to evade the Act, is guilty of an indictable offence and liable to imprisonment or fine or both, and he is also liable to deportation. Deportation is the act of forcibly sending a person out of this country. The Courts are not charged with any duty or authority in this respect, but by s. 27 (a) of the Act, where a person is liable to deportation, the Minister is authorized to apprehend and deport. By the Act the Minister is charged with the administration of the Act. The Governor-in-Council may make regulations for the carrying out of the provisions of the Act and it would seem that the question of deportation is solely with the Minister. The only question I have to consider is whether in any case the Minister can deport without having first indicted and obtained a conviction for a violation of the Act. A person having violated the Act is liable to indictment and imprisonment and is also liable to deportation. By the clause giving the Minister the power to deport a conviction is not made a prerequisite, but he is empowered to deport simply where the person is liable to deportation, that is, where he has landed without payment of the tax or otherwise infringed the Act. The Minister seems to be charged with the responsibility not only of the deportation, but of ascertaining the liability of the person to deportation. If the Minister were intended to be limited in his powers of deportation to cases of previous conviction in the Courts, one would expect to find the limitation in the section giving him his powers, but no such limitation is there made; on the contrary, in all cases under the Act where a person is liable to deportation, the Minister is empowered to act.

Looking at the whole scope of the Act I do not think it could have been intended that the Minister's power to deport should be limited to cases of previous convictions. Section 25 covers a class of cases (liable to deportation) where it would obviously be considered necessary that deportation should immediately be made if the Act is to be effective, such

as cases of paupers and infectious diseases, etc., and I cannot but think that the question of determining the liability was deliberately placed in the Minister by the terms of s. 27 (a). I am of opinion that his authority is not limited to cases where previous conviction has taken place.

The applicant will be remanded to the custody of the master of the S. S. "Bornu."

NOVA SCOTIA.

IN THE SUPREME COURT.

DRYSDALE, J., AT CHAMBERS.

OCTOBER 2ND, 1908.

RE IRA EVERETT DYAS.

Medical Practitioner—Qualification—Registration — False Certificate—Resolution of Medical Board to Cancel Registration—Appeal.

Appeal from a resolution of the Provincial Medical Board removing the name of appellant from the register of qualified physicians and surgeons authorized to practice in the province.

J. J. Ritchie, K.C., for appellant.

W. B. A. Ritchie, K.C., for respondents.

DRYSDALE, J.:—This is an appeal under "The Medical Act" from an order or resolution of the Provincial Medical Board directing that the name and qualifications of Ira Everett Dyas be erased from the Medical Register kept by the Registrar of said Board under the provisions of the said Act. Dyas obtained registration in 1901 on the presentation of certificates from Tufts Medical School shewing pass marks on various subjects covering a three years' course at that school, and on certificates for a one-year course at the Boston College of Physicians and Surgeons.

On a complaint being subsequently made charging the said Dyas with having secured his registration by means of

false certificates, the said Board undertook an investigation, and, as appears from its minutes, after a somewhat exhaustive inquiry, the conclusion of the Board was to the effect that the registration in question was obtained by means of incorrect certificates. Thereupon the resolution under appeal was passed.

After hearing all the evidence submitted, I have come to the conclusion that the finding of the Board was a correct one and that the appeal herein ought to be dismissed. The Tufts certificates used, shewed pass marks over a period of three years on 13 subjects, whereas the evidence satisfies me beyond reasonable doubt that correct certificates from that institution should have shewn failure in most of the subjects mentioned. As to the certificates used by Dias I have only to say in the words of the resolution they were incorrect, and of this I am fully satisfied.

The authority of the Board to erase the name of Dias was raised, and it was argued that the power of the Board under the Act was limited to erasing his qualification only, but on a careful examination of the Act, I conclude that the Board has the power, after a proper inquiry, to erase any entry proved to the satisfaction of the Board to have been fraudulently or incorrectly made.

The decision of the Board will be confirmed.

QUEBEC.

SUPERIOR COURT.

SEPT. 4TH, 1908.

LAMB v. LAMB.

Company Law—Stock Subscription—Right to Subscribe as between Usufructuary and Proprietor—English and French Law Compared.

MARTINEAU, J.:—Is it to the usufructuary, or to the proprietor of the shares, that accrues the right of subscribing to a new issue of stock, which right, by reason of the issue being made at a price lower than the market value of the former shares, has, per se, a special value of its own? Or, if such

right is in part disposed of for value and with the consideration so received from the sale thereof, the purchase is made of the remainder of the new stock primarily assigned to the original shareholders, to whom does such new stock belong? Such is the question which has been submitted to me, a question of great intricacy and difficulty and upon which I have been unable to find any judgment of our Courts. It can be readily seen, therefore, how much I regret that chance has imposed the duty upon me of being the first to solve the problem.

The facts, from which the present litigation has arisen, can be condensed within a few lines. By deed of gift *inter vivos*, James Lamb gave to the present defendant, plaintiff's children, a certain immovable property, situate in what was formerly known as St. Joseph's Ward, Montreal, with the proviso that the plaintiff should receive, during his lifetime, the rents, issues, revenues and profits to be derived from said property. With the consent of all the interested parties the property in question was sold for the sum of \$35,000, and 260 shares of C. P. R. stock were bought with the money to replace the property, and the said shares, in virtue of a deed of agreement entered into by all the parties, were registered in the books of the railway company in the names of the plaintiff and of two of the defendants in the quality of trustees. Since the date of such purchase of its stock, the Canadian Pacific Railway Company has thrice issued new stock, the shareholders having always had the right to take one share of the new stock for every five shares of old stock. This right was transferable. The parties to the present action sold their rights, with the exception of 38 shares which they had subscribed for and for which they paid with what they had received from the sale of their other shares. The plaintiff received the dividends upon the new shares as well as upon the old, but now he claims the ownership of the new shares.

In support of his contention, the plaintiff advances the following arguments: The clause of the deed of gift, whereby he is authorized to receive the rents, issues, revenues and profits, creates a usufructuary right in his favour; and as the usufructuary being obliged to preserve the substance of the thing of which another has the ownership, and, in addition, to return it to the owner, he (the plaintiff) will satisfy this obligation by preserving and transferring to the defendants the original purchase of 260 shares; consequently, all the

other shares are his absolute property, being, and to be, considered as being simply as issues, revenues and profits of the original shares. He further contends that to the possessor of the old shares alone belongs the right to subscribe to the new issues of stock; but as the usufructuary possesses the property (the stock), he has consequently the sole right to subscribe to the new stock.

In answer, the defendants, at the outset, say that the plaintiff does not possess a usufructuary right, but simply a right, arising from the deed, to receive the revenues of the property; that as such donee he has no real right in the object of the present litigation, but he has simply a claim upon the stock, and, consequently, he cannot pretend to the ownership of the new shares. In addition, defendants say that even supposing the deed in question were a deed of gift, the plaintiff's action would be unfounded, because the right to subscribe to additional shares in the capital stock of a company is not a revenue or profit, but is an adjunct to the capital originally invested.

It seems to me that the proposition that the usufructuary is merely obliged to preserve the object of the usufruct and return it to the proprietor, and that, as a consequence, every fruit or revenue or profit produced by the thing, or which is derived through it, is equally the property of the usufructuary, is not true. According to my point of view, to so interpret article 443 C. C., as to convey the idea that the usufructuary is only obliged to preserve the object of the usufruct and then return it intact to the proprietor, is an error. On the contrary, the usufructuary must deliver to the proprietor any increase caused by allusion to the land of which he has the usufruct, and not only that, but he must also return things which he himself did not even enjoy, such as islands formed during the usufruct near the land which is subject to it and to which such islands belong. (458 C. C.)

The plaintiff's second proposition, based upon the usufructuary's possession of the shares, appears to me to be equally not well founded. The usufructuary has possession of the property for the sole purpose of enjoying the fruits thereof, and he can therefore under no circumstances allege such possession for the purpose of obtaining what is not a fruit of the property: 6 Laurent, No. 327.

Plaintiff's conclusions, based upon article 443 C. C., are, consequently, false. And, in any event, not that article,

but article 447 C. C., is the one which lays down the nature and delimitations of the enjoyment of the usufructuary. "The usufructuary has the right to enjoy every kind of fruits, whether natural, industrial or civil, which the thing, subject of the usufruct, can produce," says article 447 C. C., *Fuzier-Herman* vo. *Usufruit*, No. 116. Does the right to subscribe to new stock fall within the scope of this definition? It appears to me that it does not. From my point of view, the fruits or revenues derived from a share in the capital stock of a commercial corporation are nothing else but a proportional part of the interest of the shareholder in the capital stock, divided among the shareholders according to the will of the directors of the corporation, such as, ordinary or extraordinary dividends, bonuses, fully paid up shares or shares not fully paid up on their face, but which can be liquidated by either a dividend or a bonus. That is all that a shareholder can hope to receive from the company at certain stated intervals as a direct result of his being a shareholder, always in conformity with the nature of the corporation and the provisions of its charter. In certain cases, therefore, the issue of new stock at a price lower than what the old stock sells or is quoted for, may be the cause of procuring certain advantages to the old shareholders, but any such issue of stock is not a profit earned by the corporation, inasmuch as it will simply invest the new capital it thus obtains.

It is to be further remarked that this co-called hidden profit may not eventually turn out to be one in reality. It depends entirely upon the use to be made of the new capital.

If the new capital is to be employed for the purpose of renewals, or for extensions from which no immediate profits can be taken, the shareholder incurs the risk of having his dividend reduced either immediately or in a few years: *Fuzier-Herman* v. *Sociétés Commerciales*, No. 2,542. Is it not reasonable that the profit or loss should be brought home to the same individual? This advantage exists only when the shareholder refuses to subscribe to the new issue of capital, because when he does subscribe the future alone can tell whether he has made a good or a bad investment.

Finally, corporations are not bound to issue new stock at a price below the market value if it can be sold at the market price, but it would seem to me that the stock would require to be very strong if it were not to become lowered in price by the new issue, and the shareholders could not claim that the

corporation would realize a profit inasmuch as the proceeds from the new issue would be added to capital account. It is more certain that, under such circumstances, the corporation would issue a number of shares than would be the case if they were to be sold at a lower price, so that, in any event, the corporation would receive about the same additional amount to add to its capital.

There are, therefore, many probabilities in the matter, all possible, and, I might say, of daily occurrence. Can it be seriously contended that when the new stock is issued at a profit such stock is to go to the usufructuary, but that when the new issue is not made at a profit the stock goes to the proprietor. It would be an unreasonable system and I prefer the American rule, which looks upon a new issue of stock as an increment, and as an accessory to the capital, without in any way distinguishing the manner in which the new stock is issued: *Cook on Corporations*, No. 559.

No decisions in England and in France are exactly pertinent, but the jurisprudence of the two countries can be readily assimilated with the American rule. In England, extraordinary dividends, either in money or shares, are refused the usufructuary and are given to the proprietor (*Bouch v. Sproule* (1887), 12 A. C. 385), and in France the proprietor receives the premiums allowed upon the repayment of certain obligations, although such premiums have been practically paid by allowing the proprietor to keep certain amounts of interest due by him. The proprietor is also given the right to share in the division of the capital upon the dissolution of the corporation.

His Lordship cites: *Fuzier-Herman*, Code Annoté, art. 582 C. C., and continues:

All these cases are far less favorable to the proprietor than the present one. And, finally, the circumstances surrounding the several issues of new stock and the wording of the resolution authorizing them strike me as showing an express intention that the new shares should belong, not to their nominal possessor, but to their proprietor. The shareholders voted these new shares, and to the duly registered shareholders they were offered. Arbiters as to whether they should or should not issue such shares, the shareholders were free to issue them at the price they wished and to whom they deemed proper.

For these several reasons, I think the plaintiff's action is unfounded, and it is dismissed, with costs.

QUEBEC.

DISTRICT MAGISTRATE'S COURT (SHERBROOKE).

SEPTEMBER 24TH, 1916.

COLLECTOR OF PROVINCIAL REVENUE v. GEORGE BROWN.

Liquor License Act of Quebec—Sale of Intoxicating Liquor by Druggist—Certificate—Sale on Prescription of Veterinary Surgeon — By-law of Municipality Prohibiting Sale — Validity—Municipal Code, Quebec, art. 562.

MULVENA, DIST. MAG.:—The defendant, a druggist in the village of Danville, is charged with the violation of article 105 of the Quebec License Act, by selling intoxicating liquor without a proper certificate.

The proof establishes that a bottle of brandy had been sold under a prescription from H. R. Cleveland, D. V. S., and the whole question at the argument turned upon the right of a druggist to sell liquor upon a prescription of a veterinary surgeon. It was contended on behalf of the prosecution that no regular certificate had been given, that article 58 of the License Act states that "such a certificate could only be given by a physician to a patient under his immediate care." On the other hand, in behalf of the defence, it was urged that the liquor was dispensed in good faith by the defendant and that in any event, especially since the incorporation of veterinary surgeons, they were entitled, in this respect, to the same privileges as regular doctors.

It was also sought by the prosecution to hold the defendant responsible under article 55 of the License Act on the ground that a municipal by-law had been passed in the village of Danville prohibiting the sale of intoxicating liquor in that locality, and that a copy thereof had been transmitted to the collectors of provincial revenue.

I find that article 562 of the Municipal Code calls for the "sending of an authentic copy of such by-law or resolution to the collectors of revenue," but the one produced in this case is merely a typewritten copy of everything, including the signatures, and is not a certified copy, and does not purport to be one, and is absolutely of no value as such.

Article 58 of the License Act is quoted by the prosecution to shew that certificates only can be issued by a physician applies to cases where this by-law has been passed and regularly sent to the collectors. And I find, on the other hand, that article 105, under which the prosecution in this case was really taken, gives the right to druggists to sell intoxicating liquor in quantities not exceeding one Imperial pint "under a certificate from a registered medical practitioner," and it has been shewn in this case that the veterinary surgeon is duly registered as such veterinary.

I find also that articles 4052 and 4052A of the Revised Statutes of Quebec (The Quebec Pharmacy Act) speak of the rights of physicians and surgeons and duly licensed veterinary surgeons with regard to prescriptions. So does 4034 of the Quebec Pharmacy Act, and I think it would be going very far indeed to hold that a veterinary surgeon is not a "medical practitioner" within the meaning of art. 105.

There is no doubt from the evidence in this case that very improper use was made of the liquor thus obtained. But it does not show that this was done in any way with the connivance of the defendant, who, so far as the evidence goes, appears to have dispensed the prescription in good faith. I do not find anything in the acts incorporating the veterinary surgeons recently passed, nor in the License Act, directly giving the right to veterinary surgeons to prescribe intoxicating liquor as medical practitioners, but I can understand that in some cases it may be necessary for the treatment of animals, as well for that of human beings. I find, under all the circumstances, that the complaint against the druggist should be dismissed.

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NOVA SCOTIA.

SUPREME COURT.

LONGLEY, J.

OCTOBER 24TH, 1908.

HALIFAX GRAVING DOCK CO. AND OTHERS v.
MAGLIULO ET AL.

Shipping—Repairs—Advances—Attaching Creditors—Priority—Debtor and Creditor—Equitable Lien—Notice—General Average—Adjuster's Commission.

Trial of issues as to right to priority of payment as between party making advances for repairs of ships and parties attaching under absent or absconding debtor process.

H. Mellish, K.C., for plaintiffs (attachers).

W. B. A. Ritchie, K.C., for claimant.

H. B. Stairs, for garnishee.

J. A. Knight, for defendants.

LONGLEY, J.:—The circumstances which led to the present contest may be briefly stated as follows:

The Italian barque "Afezione" arrived in Halifax on a voyage to Buenos Ayres on November 9th last in a damaged condition, having a cargo of lumber. Attempts were made to get money to repair, but they seem to have been abortive. It was necessary however to have the cargo removed in order that a survey be held, and it required fully \$1,000 to pay for removing the cargo. Other indispensable expenses were incurred which it was necessary to have funds to meet. To obtain funds for this purpose an agreement

was entered into with E. F. Williams of Dartmouth, whereby he agreed to advance \$2,000, and did advance it, on condition of receiving a premium of \$100 flat interest. His security for this advance was, among others, the following:—

“In case the said master shall, while said barque is in the port of Halifax, receive any moneys from the owners of the cargo on account of advanced freight, general average or other charges, or shall obtain any money or moneys on bottomry bonds or other security upon the ship or cargo, or shall receive any money from the owners or otherwise on account of said barque or cargo, the same or a sufficient portion thereof shall be applied first in repayment of said sum of two thousand dollars, and said interest, &c., and Williams reserves all rights of action or lien he has or may have against ship, &c.”

This agreement was under seal and made between Menna the master, and W. J. Fisher, Italian Consul-General, representing the owners of the ship on the one part and Williams on the other.

When it became known that the ship was to be sold and the cargo as well, it became necessary to have an adjuster appointed to determine the general average and the contributions of the ship and cargo respectively to this, and by arrangement of all the parties John Strachan was appointed for this purpose, and his adjustment is before me, and under it a large contribution toward general average is found due from the cargo to the ship. I am going to accept Mr. Strachan's adjustment unreservedly for the present. An objection has been made to a few items of his apportionment, and these are open to further consideration. Unless further evidence is offered I shall adopt his figures, except, possibly, his claim for commission, \$102.80.

Mr. Strachan in his evidence says it is customary that the contributions, indeed all the assets in such cases, are to be paid to the adjuster and he makes the distribution.

Before the adjustment was made, but in anticipation of a substantial contribution from the cargo to the ship, the master of the ship, and the agent of the owners, Mr. Fisher, gave Williams an order on Strachan, the adjuster, for the payment of two thousand dollars out of the funds obtained by the sale of the ship, and the general average contribution from her cargo. This was dated March 10th, 1908, and was accepted by Strachan, payable when in funds.

The agents for the cargo owners in Halifax were S. Cunard & Co., and all the business in connection with the matter was done by one of the members of the firm, Mr. Geo. E. Franklyn. After the adjuster had determined the contribution which the cargo must make to general average, Cunard & Co. for some reason did not pay over this amount which they had in their hands to the adjuster, but retained it waiting some modification of the adjustment itself. And while the money was thus in the hands of S. Cunard & Co., but after the order had been made upon Strachan and his conditional acceptance, the plaintiffs took proceedings against the defendants, the owners of the ship, as absent or absconding debtors, and attached the money in the hands of Cunard & Co.

The real and essential point before me is whether Williams' agreement of December 6th, together with the order of March 10th, shall be treated as an equitable assignment of the moneys to be received from contribution of cargo, and therefore guarding it safely against subsequent attachers. One point has been raised that notice was not given to Cunard & Co., who held the money. I am by no means sure that such notice is necessary. If Williams has an equitable lien, it would not, it seems to me, be dependent upon whether Cunard & Co. had notice or not. But I have no difficulty under the evidence in finding that Cunard & Co. knew of Williams' advance of the agreement and indeed of the whole transaction, including the order of March 10th, which was given and accepted prior to realizing the \$8,100 received for sale of cargo.

Under the authority of *Re Irving* (1877), 7 Ch. D. 419, and *Lane v. Dungannon* (1891), 22 Ont. Rep. 264, I think I must treat Williams' assignment as giving him a first and continuing lien on the sum which the ship received as a contribution from cargo.

Two issues were submitted for trial and determination by Mr. Justice Graham in his order of reference, as follows:—

1. Had Geo. E. Franklyn goods, credits or effects of defendants in his possession or under his control at the time of the service upon him of summons for agent in the above actions, and if so to what amount? I answer (subject to any modification of the adjustment): Yes, \$2,596.81.

2. If the previous question is answered in the affirmative do such goods, credits or effects or any part thereof, and if so what part, belong to John Strachan and Edward F.

Williams, or one of them, or have or has said John Strachan and Edward F. Williams any, and if so, what claim, lien or charge thereon?

I answer, John Strachan has a claim for \$100 on this fund as a lien. His fee for adjustment is \$250, he has received \$150, leaving a balance of \$100 still due. He also makes a claim of \$102.82 as a commission for paying out the several claims against the fund which he claims should be paid over to him as adjuster. If the money is paid over to him and he undertakes and does the work of paying claims, he is entitled to this commission. If, however, as a result of this contest, the money is paid over by Cunard & Co. direct, I do not think he would be entitled to receive his commission.

I answer also that Edward F. Williams has a claim on said fund prior to attaching creditors, of \$2,000 and interest from the time he ceased to receive interest from the owners of said barque.

NOVA SCOTIA.

SUPREME COURT.

GRAHAM, E.J., AT CHAMBERS.

OCTOBER 9TH, 1908.

COULSTRING v. NOVA SCOTIA TELEPHONE CO.

ET AL.

Action for Nuisance—Obstruction of Access to House—Striking out Defendant—Practice.

Action for a nuisance. Applications to compel plaintiff to elect and to strike out one defendant.

W. A. Henry, K.C., for plaintiff.

J. A. Chisholm, K.C., and T. R. Robertson, for defendants.

GRAHAM, E.J.:—This is really an action for a nuisance, namely, obstructing the sidewalk, the access to the plaintiff's boarding house, first, by erecting a boarding along the sidewalk in front of a building in course of construc-

tion adjoining plaintiff's house, and that it was unlawful; second by wrongfully digging a trench across that sidewalk and placing the material excavated upon the plaintiff's property and continuing these things.

The statement of claim charges that the defendant company was erecting the building and committed each act of obstruction. Then it alleges in precisely the same terms that the defendant Horne was erecting the building and erected the boarding. It does not charge him in connection with the trench. There is an application to compel the plaintiff to elect and also one to strike out the defendant Horne.

Of course previously to the Judicature Rules, joining two defendants and apparently declaring against each for a separate act was so wrong that it is difficult at first to conceive now that such a course may be possible. I shall treat Horne as the contractor, and, if necessary, I shall amend the statement of claim in that respect. It is quite obvious, apart from what was freely alleged at the hearing, I think it is the only way in which each defendant could be said to have erected the building and therefore a lawful inference.

Then I think it is one transaction obstructing the access in the course of building operations.

Then I think it is often difficult to say when the owner of a building is liable and when the contractor is, particularly when there is an infraction of the law charged. (Hudson on Building Contracts, pp. 781, 782). The difficulty I suggested at the hearing, viz., that there may have to be two verdicts, is answered by the case of *O'Keefe v. Walsh*, (1903) 2 Ir. R. 681. Now none of the cases cited are exactly like this.

I think that neither *Sadler v. G. W. R. Co.*, (1895) 2 Q. B. 688 (1896) A. C. 450, nor *Gower v. Couldridge*, (1898) 1 Q. B. 352, nor *Thompson v. London County Co.*, (1899) 1 Q. B. 840, is this case. But I think that *Bennetts v. McIlwraith*, (1896) 2 Q. B. 464, *Sanderson v. Blyth*, (1903) 2 K. B. 533, and *Bullock v. London General Omnibus Co.*, (1907) 1 K. B. 264, the later cases, show the distinction.

If you can state your claim against an owner and a contractor jointly, which is a very usual thing, I see no objection to stating it against first one and then in the alternative against the other.

Then Order 16, r. 5, permits Horne to be joined although he is not connected in the pleadings with the drain.

The application will be dismissed and the costs are reserved for the trial Judge.

NOVA SCOTIA.

SUPREME COURT.

LONGLEY, J.

OCTOBER 23RD, 1908.

EASTERN TRUST CO. v. BOSTON RICHARDSON MINING CO.

Company—Mining—Wages—Lien—Claim, of Bondholders—Priority — Winding up—Subrogation.

Claims of lien for moneys paid for wages, in priority to claim of bondholders.

W. B. A. Ritchie, K.C., for claimants.

H. Mellish, K.C., for the Trust Co.

LONGLEY, J.:—In July last the defendant company was carrying on mining at Isaac's Harbor, and S. R. Giffin & Son were their agents in that place. The wage bills to their employees in the mines were paid by S. R. Giffin & Son on the presentation of orders on them from the Richardson Co., in the following terms:—

No. 1005. Boston-Richardson Mining Company. Series H. \$42.40. Goldboro, N.S., July 15th, 1908.

Pay to the order of John Jones forty-two . . . 40/100 dollars, value received, and charge same to our account.

Boston-Richardson Mining Co.

Account of wages.

Per H. S. Badger,

To S. R. Giffin & Son.

Superintendent.

On the 11th of August the Richardson Co. being in default to the bondholders, a winding up order was granted, and the Eastern Trust Co. were appointed receivers.

The Richardson Co. not having reimbursed Messrs. Giffin & Son for their advances of July wages to the men,

the latter began to consider steps to enable them to secure their money. When they advanced the money for wages, it was in accordance with a previous custom. They had been paying these wages on similar orders for some time, and after they had paid them they were accustomed to draw on the company for the amount advanced, which drafts the company paid. In August, owing to their financial difficulties, they did not respond to the drafts.

When Giffin & Son paid the wages on the orders as above described they caused each employee presenting them to endorse the order, and these they kept exactly as a banker keeps the cheques upon the bank by a customer, but no assignment of the claim was taken, nor is there any reason to suppose that the advance was made on any other security than the credit of the company. In September, after the winding-up order had passed, and the receiver entered into possession, Messrs. Giffin & Son obtained assignments of their claims and rights from the employees whose bills they had paid.

The motion now before me made on behalf of Giffin & Son is that the claim of that firm on account of money advanced in August to the men, on the order of the company, should be treated as a lien, and they be placed in the same position as the men would have been in if their wages had not been paid. Section 3 of the Mechanic's Lien Act, ch. 171, R. S., establishes this lien in plain terms. Whether Giffin & Son are entitled under the law to the benefit of the lien, under the facts existing, is the question before me. They have registered their lien, after obtaining the assignment, but all long after the money was advanced, and after the receiver had taken possession of the property of the company.

If a workman, who has a lien for his wages, induces a person to advance him the amount of his claim on the faith of an assignment of his rights, I have no doubt that the doctrine of subrogation would apply and the person so advancing the money would on registration be subrogated to the workman's lien as a security for his advance. I have also no doubt that if a bank paid cheques given by a company for the wages of the men employed by the company, the bank would have no claim for a lien upon the subsequent insolvency of the company.

Which of these transactions does the state of facts most nearly resemble? As I understand the circumstances the

advance made by Giffin & Son does not fulfil the conditions of either legal or conventional subrogation. The best legal definition I have been able to find of subrogation is as follows: "Legal subrogation is allowed only in cases where the person advancing the money to pay the debt of another stands in the position of surety, or is compelled to pay the debt to protect his own rights." Under this Giffin & Son would have no claim. They were under no obligation to pay these orders. They could have refused to pay them. They paid them voluntarily, and it seems to me entirely on the credit of the company. Again take the definition of conventional subrogation: "Conventional subrogation results from an agreement made either with the debtor or creditor, that person paying shall be subrogated."

In this case no such agreement can be found. There is no evidence before me in the affidavits that any undertaking had been given in advance by the company, that if Giffin & Son would pay these claims of the employees they should have the lien rights which then existed in the men. And, as I have already pointed out, there is no pretence that when the drafts were paid to the men, that they took any assignment of the interest of the men or made advance in any other way than they had always done for months previously on the credit of the company. It is true that Oswald S. Giffin, one of the members of the firm, in an affidavit made the 12th day of October, after the motion in this case had been made and argued before me, says he "was aware that the miners were entitled to liens for wages upon the property of the defendant company, and believed when paying over the money on behalf of the firm upon such orders as aforesaid, that said firm would have the benefit of such lien." This statement carries with it very little weight in my mind. It is impossible for any of the parties to this contest to know or give evidence upon the operations of Mr. Giffin's mind. All that can be done is to take note of the acts and deeds surrounding the transaction and draw reasonable inferences. I do not think that anything in the circumstances justifies the slightest ground for doubt that Giffin & Son advanced the money on the credit of the company and that the lien theory was an after thought growing naturally out of the failure of the company.

I have left out so far any reference to the doctrine of equitable subrogation. Using a satisfactory definition given by high authority: "It does not depend on priority or con-

tract, express or implied, except in so far as the known equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case, and on the principles of natural justice." It is upon this equitable doctrine, if at all, that Giffin & Son must succeed. I must confess I cannot discover anything in the circumstances of this case which brings it even near the equitable doctrine. As before said, if Giffin & Son had advanced the money to the men at their request and on the faith and credit of their lien rights, the equitable doctrine applies; but if, as in the case of a bank, they simply paid the cheques of the company on the credit of the company, no equitable doctrine of subrogation arises. Nor do I conceive that a bank, having paid a number of workmen by paying the cheques for the same of the employing company, can, after the company has gone into liquidation, subrogate the lien of the workmen by subsequently obtaining from them an assignment of their claims or lien. The moment the bank paid the man's wages, the lien ceased, and could not, I think, be artificially revived. If, however, a workman having an unpaid claim for wages, went to a bank and obtained payment of the same on the faith of a transfer of his rights to the bank, then I apprehend the equitable doctrine of subrogation would come in to give the bank a lien in the stead of the workman.

Believing that Giffin & Son have not established any right of subrogation, legal, conventional or equitable, in this case, I am obliged to decline to make an order on the receiver to pay their advances as a lien taking priority of registered bondholders.

NOVA SCOTIA.

SUPREME COURT.

GRAHAM, E.J.

OCTOBER 26TH, 1908.

SMITH v. MACGILLIVRAY.

*Trespass to Land—Right of Way—Prescription—Lost Grant
—Permissive Use—Evidence.*

C. E. Gregory, K.C., for plaintiff.

R. R. Griffin, for defendant.

GRAHAM, E.J.:—This is an action of trespass to land and the defence is user of a way as of right over the land for twenty years before this action under the prescription provisions of the statute also claiming the way by lost grant. There is also a defence of an action brought eight years before which was compromised. It does not claim prescriptive use for twenty years before that action.

Smith owns land along the mountain road in Antigonish county and the defendants own land adjoining. They can get off their farm by the Pleasant Valley road and they do go that way to church, but to go to town it is shorter to cross the plaintiff's land and thus reach the mountain road. some 179 feet across by the plan. And they claim that they and the late Hugh MacGillivray, husband of one defendant and father of the other, have respectively been using that way for a great number of years—Alexander MacGillivray says over seventy years.

First, dealing with prescription, the question is whether it has been used as of right. The contention is that it has been permissive.

In dealing with the question of prescription the period to regard is the twenty years before action. But of course evidence before that period as to user on the one hand, acts of permission on the other can be given to fortify one or other of those positions.

First, a witness called by defendants (Hugh MacDonald), proves that some time not over 48 years ago, "quite a little while after" John Smith, the father of Hugh Smith and Hugh MacGillivray, had a conversation respecting this way. He says, "They agreed to four dollars for the right of way. MacGillivray wanted the right of way, a right across from the mountain road to his own farm, and MacGillivray offered him four dollars and he accepted." I infer that that was not the inception of the user. Alexander MacGillivray, also called by the defendants, says, "My brother Hugh made a sill for old John Smith and John Smith came to me to frame it. The old man Smith said he was satisfied and my brother Hugh said, "I made you the sill for that bit of a road, and the day's work to-day." He put the sill under the house, and old man Smith said he was satisfied. And my brother Hugh said: 'to make you satisfied, I have eighty cents here, and I will give it to you, and he gave him the eighty cents. That was about 1870. . . . I fix that date because four

years after that I went to the Bay of Fundy to follow ship-building in 1874, &c."

The plaintiff says: "I consented to him using that road 35 years ago for hauling out some timber that he wanted to get across from the rear of his farm to the mountain road. He offered me a couple of days' work for the privilege of getting this timber out. The work was to help me build the house. He hauled some timber out, but I don't know how much. That was 35 years ago. It ran like that until 23 years ago, when Hugh MacGillivray got married and settled in his own house and he asked me for the privilege of using that road. I said, 'you can use the road by not causing any damage.' The next time that we had conversation about that road was 17 years ago. I told MacGillivray that I was going to use that field and he would have to stop going through that road. . . . Well, 17 years ago he was shifting the road through his own farm but not on mine . . . I thought he was going to join it on to this right of way. I sent word to him by a man who was working for me by the name of Joe MacGillivray, who is now away out of the country, for him not to ditch or grade any road on to my farm but to come and see me at once. The man did come to see me. . . . He arranged with me about the privilege of the road. He said he would not either ditch or grade the road but take it as it was, and that he only wanted a road at times there, and he offered me another day's work at that time to give him the privilege. That was all at that time. I told him he could use it then for this day's work. There was no length of time mentioned as to how long he was to use it.

"Nine years ago I was ploughing and had grain in that field and I fenced it. I put up the road fence nine years ago and closed it, that is the mountain road fence. Hugh MacGillivray came to my place to get the privilege to fence this road that is in dispute between the mountain road and his own land, that is to fence on each side and he would get the stuff out to do it. His son was working quite a way from the road and he spoke to us on that day, that is, his son John. I told him I could not agree, that it would not suit my field or pasture to fence it in that way, that I could not give it to him at all on no condition, and he went home and he broke an opening through at the end of the road in dispute to get on the mountain road, and at that time I got an action against him."

Then he goes on to relate that this action was compromised before the trial came on. There is a slight difference as to the terms, but it is not very material. MacGillivray was to have the use of the way but a gate was to be kept across it on the mountain road by one or other of them, it is not very material which. According to the defendant's witnesses it was in the event of the defendant not putting a gate there that plaintiff might do so.

Each party was to pay his own costs. There was no formal termination of the case.

A gate was placed there. Then there was trouble because Hugh MacGillivray's son left the gate open and the plaintiff's cattle got upon the highway. The plaintiff shut the road. That was about three years ago. He says: "When I was shutting the road and the road was shut, Hugh MacGillivray came from his own house down to the fence, that is to his own line, and he was going to come over into the field. I forbid him to come into that field and said that I was going to stop him from having the use of the road . . . That evening his woman came over to the house, Mrs. Catherine MacGillivray, and said that she came over to arrange with me to see if they could get the road open. I told the woman it was no trouble to arrange with me, that I would give them the road, the same as they had it before if they would put a gate there and attend to it and not let any damage take place. The old gate was in bad repair. It was not much of a gate. She thanked me and said that was very good, that she would be careful a gate would be put there next day. There was a gate put there next day, her husband put it there, and she said that she would see that this gate would be attended to; and at any time she would see that gate open she would go herself and shut it. It was in sight of their house, but not in sight of mine."

Mrs. MacGillivray hardly varies this. In cross-examination she says: "I told him I came there to fix up about the road. I wanted to make peace, and Hugh Smith said it would be all right if my husband put the gate there and kept it up. I went back and told my husband and that we would shut it as we would use it, of course."

She also says, and I think it is of importance, "I don't remember any fence before that or any gate on the road before that, not before the lawsuit nine years ago. There was not a gate before nine years ago." (She had gone there 22 years ago last March.) And her son Daniel MacGillivray,

21 years old, says: "Previous to that time (the first action), I do not remember of any fence along the road. It was not fenced up across the way we were using. There was no fence on this way. It was always through the field."

Upon this evidence I have come to the conclusion that the defendants and Hugh MacGillivray before them, under whom they claim, had not enjoyed this way "as of right" during the period mentioned in the Statute.

There has been permission and there has been compensation for the use during the twenty years period.

In the case of *Gardner v. Hodgson*, 1901, 2 Ch. 216 (on appeal (1903) A.C. 229), Vaughan Williams, L.J., said: "The case, to say the least of it, leaves untouched the proposition established by *Tickle v. Brown* (4 A. & E. 369), that in case of an easement claimed under s. 2, a payment within the period of twenty or forty years may so negative the enjoyment as of right as to prevent a claim under the Statute for the easement."

Romer, L.J., at p. 217, said: "It is clear that if the enjoyment has been by permission granted by the owner of the servient tenement during the forty years then the enjoyment is not of right." At page 218, he says: "Now it appears to me that if nothing were known of the circumstances under which during one particular year of the forty, a certain payment had been made in respect of the user of a way for that year, the proper inference from the mere fact of payment would be that the payment was made for permission asked and granted to use the way."

And in the House of Lords, Lord Halsbury said: "That right means a right to exercise the right claimed against the will of the person over whose property it is sought to be exercised."

The doctrine of lost grant does not, I think, help the defendants. In *Gardner v. Hodgson*, 1903 A. C. 240, Lord Lindley said: "For that doctrine only applies when the enjoyment cannot be otherwise reasonably accounted for."

Coming to the former action nine years ago and its compromise out of Court, resulting in an agreement that the defendants' predecessor was to have the right of way subject to a gate at the road and so on, its effect in law must be considered. It does not constitute an estoppel, a *res judicata*: *Jenkins v. Robertson*, L. R. 1 H. L. Sc. App. 122.

The agreement was not in writing and therefore did not create an easement. I think it is like the agreement admit-

tedly made three years ago, it is but a license and that license could be withdrawn.

In the case already cited Lord Halsbury at p. 231 says: "I do not think that this (payment for the right to use the way) would have established a right in the proper sense, because, being but a parol license, it might be withdrawn and an action would lie for damages, but she would have no right to the way."

The agreement, inasmuch as it introduces the gate, does not help out the theory of prescription, but rather, I think, tells against it. I suppose a way with a gate may be prescribed for. It was not done in the former case, but for half of the period there was no gate. Perhaps in this country a gate in such circumstances, would not be deemed material in considering whether the statutory period had run. But in England in the case of *James v. Hayward*, Sir W. Jones, 222, Jones, J., said: "If a private man hath a way over the land of I. S. by prescriptive grant, I. S. cannot make a gate across the way." And if that is so here (perhaps it is only a question of fact), it would seem that Hugh MacGillivray, when on two separate occasions he agreed to a gate, was affording evidence that he was not claiming to enjoy the way as a right.

Of course the compromise has place as an admission and in so far as it did not constitute merely a drawn game, effect must be given to it. Not as an admission affecting anything which has happened since, viz., during the last nine years, but as inconsistent with his present claim as to the period before that.

But surely an admission as to a mixed question of law and fact by a layman, particularly in respect to a question of a right of way where the law is difficult enough, is not very conclusive of anything: *Sommerset v. Adamson*, 1 Bing. 75, Dallas, C.J. But a compromise does not often proceed from and imply a belief that the adversary's claim is well founded, but only indicates a preference to avoid the hazards of litigation. Here neither was willing to go to the office of the other's solicitor in order to formally effect a compromise there. In *Tennant v. Hamilton*, 7 Cl. & Fin. 133, Lord Cottenham says: "Money paid upon a complaint made, paid merely to purchase peace, is no proof that the demand is well founded."

I think the plaintiff is entitled to judgment, and I assess the damages at five dollars with costs.

QUEBEC.

COURT OF KING'S BENCH (APPEAL SIDE).

2ND NOVEMBER, 1908.

JACOBS v. THE GENTLEMEN OF THE SEMINARY.

*Sale of Goods—Horse—Hidden Defect—Myosis—Rescission—
Commercial Transaction.*

Coram, BLANCHET, TRENHOLME, LAVERGNE, CROSS,
DEMERS, *ad hoc*, JJ.

Appeal from the judgment of the Court of Review which reversed the judgment of the Superior Court and maintained plaintiffs' (respondents') action with costs. The judgment of the Superior Court was rendered at Montreal on the 4th April, 1907. The judgment of the Court of Review (TELLIER, HUTCHINSON, and LAFONTAINE, JJ.), was rendered the 14th December, 1907. On the 26th October, 1906, appellant sold to respondents a horse for the price of \$225, then and there paid, and, plaintiffs allege, the horse was afflicted with a hidden defect, namely, myosis (boiterie intermittente), and that even if it were not a hidden defect defendant took means to prevent a proper and thorough examination of the horse before the sale was consummated; that defendant had guaranteed the horse to be sound; that the disease with which the horse is afflicted, if it had been known to plaintiffs, would have prevented them from purchasing it: the plaintiffs offer the horse back to defendant and ask that the sale be declared null and defendant condemned to repay to them the price of said horse. The defendant pleaded a general denial, and, further, that the cause of the lameness was the result of want of care on the part of plaintiffs.

LAVERGNE, J., rendered the decision of the Court, and declared the present case to be purely a question of fact. One Lamothe heard that respondents wanted a horse, and on 25th October, 1906, he went to the Grand Seminary with appellant, who drove the horse in question. They saw Bonneau, respondents' head stableman and gardener, who remarked that the horse seemed very warm. Bonneau asked them to return the next morning, which Lamothe and Jacobs

did, about 8 to 9 o'clock. Bonneau again says the horse was very warm and restive. The other horse hitched to the same rig, was not at all warm. Jacobs himself put the horse in the stable. The two gardeners then harnessed him to a tumbril to see how he could work, and they simply drove him about the garden with a small load. Then they harnessed him to a light waggon to go to Bonaventure station to get a trunk; they returned by Atwater avenue. The whole journey is about three miles long. It took them an hour. The evidence shews the horse was driven slowly and carefully. It was shortly after noon when they reached the Grand Seminary. The horse was not as warm as he had been in the morning when brought to the Seminary. The horse was put in a stable, where there were three other horses, and covered with a blanket. The weather was moderate, not cold. The horse was fed and watered about half an hour after his arrival. The two gardeners having reported to their superior that the horse was a good one, Dr. Genereux, a veterinary surgeon, was telephoned for, and he arrived about half past two or three o'clock. When respondents' gardener went to bring out the horse, appellant interfered, and asked him to hold his (Jacob's) horse, and Jacob's stableman went into the stable, put a rope around the horse's neck and brought the horse out, making him hold his head high and keeping him firmly in hand. The examination took some time, and while the veterinary surgeon suspected something was wrong, upon appellant assuring him that he warranted the horse to be sound, the surgeon finally, but with a great deal of hesitation, recommended the purchase. A cheque for the price was immediately handed to the appellant. The horse was replaced in the stable. At six o'clock he was weighed, and it was then remarked that he walked stiffly. At eight o'clock he was given a good bed of straw. Next morning at seven o'clock his forelegs were so rigid that he appeared to be walking on stilts. Dr. Genereux was immediately summoned; he again thoroughly examined the horse, and concluded that he must be afflicted with a disease of some days' duration. It is in proof, and it is a significant fact, that Jacobs wanted \$235 for his horse, and told Bonneau so, and that if he got it he would give Bonneau \$15. Bonneau replied that he wanted the lowest price for the Seminary, and Jacobs reduced the amount to \$225. He promised Bonneau, as a *pour-boire* simply, he affirms, \$5 out of the money if the sale was closed. He offered Bonneau

the money again on the morning when Bonneau asked him to take back his horse. Bonneau again refused. Drs. Generoux and Daubigny agree that the disease was chronic on the day of the sale, and that the horse must have necessarily been afflicted with it at least several days previously. When the horse was heated up it shewed no signs of lameness, but after five or six hours' rest its legs became rigid. This is significant when we remember that the horse appeared to be very warm on the two occasions previous to the sale, when Jacobs drove it to the Grand Seminary. From the time the horse was put in respondents' care to the moment when it was found lame, it was treated with care, and no neglect was proved against respondents. When driven about the same distance as Jacobs is supposed to have driven it when in the hands of Jacobs, it became overheated and its lameness would necessarily not be noticeable, in the hands of respondents' employees the horse was driven slowly and carefully, and lameness developed almost immediately. A last point, parole testimony was admissible. The appellant is a horse trader, the transaction was a commercial one. Judgment of the Court of Review unanimously confirmed, with costs.

QUEBEC.

COURT OF KING'S BENCH (APPEAL SIDE).

NOVEMBER 2ND, 1908.

THE CANADIAN PACIFIC RAILWAY COMPANY v.
THE HOCHELAGA BANK.

Banks and Banking—Cheques—Authority of Station Master to Indorse for Railway Company—Freight Moneys—Misappropriation by Station Master—Embezzlement.

Coram, SIR H. T. TASCHEREAU, C.J., BLANCHET, TRENHOLME, LAVERGNE and CROSS, JJ.

The appellant, payee of five cheques, took the present action to recover the amount of them, namely, \$500.13, from

the respondent as drawee and acceptor. Respondent in its plea admits the drawing and acceptance of the cheques, but denies that the cheques are the property of the appellant, and it also pleads affirmatively that the cheques were endorsed and cashed by the appellant's authorized agent, who was, to its knowledge, in the habit of endorsing and cashing cheques made to its order, and that the agent deposited the proceeds of the cheques with the company's other cash in his custody and made due return of the whole to the appellant.

The appellant's answer was in effect a general denial.

It is recited in the judgment appealed from that the person who endorsed those cheques and obtained the amounts thereof from the respondent had authority to receive payment of all sums due for freight at the St. Jerome station in cash; that having such authority to receive payment in money of accounts due at the station, he is to be considered to have had authority to collect the amount of these cheques (which were given for freight payable at the station); that appellant did not suffer by the fact of the agent having obtained the money for the cheques, but by the fact that the agent converted such money to his own use, a thing which he could have as readily have done if the freight accounts had been paid to him in cash, and that the plea of payment is well founded. It is also recited that the appellant tolerated the practice of taking cheques in payment of freight accounts.

SIR H. T. TASCHEREAU, C.J., declared that he dissented from the judgment about to be rendered by the majority of the Court, and that he agreed upon every point with the views about to be expressed by Mr. Justice Blanchet.

Blanchet, J. (after reciting the facts and the pleadings) proceeded as follows:—The proof shews that the bank has paid the cheques. It is true, the station agent had no power to endorse and that appellant was ignorant of the fact that he had done so. But it equally appears well founded to me, both in law and equity, that appellant cannot force respondent to pay a second time if it is proved, as it is alleged, that the amounts paid out by the bank have been in fact received by appellant, according to its own instructions, either for freight or for passenger tickets, and remitted to the Bank of Montreal without any indication whence they came. The proceeds of the said cheques must have been received by appellant since it is no where proved that there

has been any defalcation at St. Jerome since the day they were paid. Appellant thus became proprietor of each of the amounts called for by each of said cheques from the moment that the amounts thereof were subsequently paid into the treasury, and, in any event, from the moment they were received by the bank authorized to collect them. It is useless to claim, therefore, that the amounts of the cheques have not been received by the appellant. To prove that it has not received the amounts, appellant claims that the station agent, in his monthly statements, never reported that he had received the money due by Beaulieu. It is proved that the agent's son had misappropriated about \$900, paid by other of appellant's customers, and to cover the deficit the agent entered from time to time in his monthly reports the amounts so stolen just as if they had been paid in during that month, and he used the moneys due by other customers to pay off freight accounts long previously paid. With the exception of \$233, it was in this way that Beaulieu's cheques were used. Appellant claims that the unauthorized payment by the bank of the cheques in question allowed Michaud to illegally use the value thereof and the bank had no right to claim that appellant had received the value of said cheques. This appears to me to be unfounded. It was not within the power of the agent to destroy the effect of the actual payments effected by him when he received and remitted to appellant the amounts paid to him by the bank, which payments are now conceded to be false, since he implied that money he had really received from the bank had been paid to him by others. The appellant, basing itself upon the false declarations of its own employee, cannot now claim, contrary to the proof of record, that it has not received the sums due by said five cheques and cannot demand that the bank be condemned to pay the amount of said cheques a second time, which would be equivalent to asking that the bank pay, in part, at least, the amount embezzled by appellant's own employee. I am of the opinion to dismiss the appeal, with costs.

LAVERGNE, J. (who rendered the judgment of the majority of the Court), said:—

The cheques were sent to the station agent by one Bruno Beaulieu, a St. Jerome merchant, in payment of freight due by him upon goods delivered to him by appellant. The agent at the said station, J. L. Michaud, had no authority whatever to endorse the said cheques and to realize on them.

According to his instructions, he was supposed to remit all cheques received by him to the Bank of Montreal, at Montreal, the duly authorized agent of the appellant for the purpose of collecting appellant's cheques. The said Michaud endorsed said cheques with appellant's name and added his own signature underneath, as follows: "J. L. Michaud, agent." Appellant never received the amount due by said cheques. The cheques were drawn upon and accepted by the St. Jerome branch of the Hochelaga Bank. Upon the endorsement, as above stated, of said cheques, the bank paid the amount thereof to Michaud. Respondent was perfectly aware of Michaud's position. It was a well-known thing, and, in any event, admitted, that he was nothing but a station agent. He was allowed to receive cheques, but he had no right whatever to endorse such cheques, made payable to appellant's order, and to collect the amount due thereunder. The respondent had no authority to pay the amount of said cheques to Michaud, unless he had an authorization therefor in due and proper form. By paying Michaud the money due by said cheques, the bank did not pay its debt and it still owes the appellant the amounts due on said cheques. I think the appellant is still the proprietor of said cheques, since it has not received payment of same. As witness for the respondent, the agent, Michaud, gave his testimony at great length, from which the following can be safely deduced:—One of his sons assisted him at St. Jerome station, and this son was allowed by him to receive moneys due appellant, for the receipt of which sums J. L. Michaud was responsible and accountable to appellant. Michaud's son embezzled and appropriated to himself a part of said receipts. The amount of Beaulieu's cheques, received by Michaud, was not used for the purpose of paying the freight due appellant by Beaulieu. J. L. Michaud collected the money payable by the said cheques and used it for the purpose of repaying and covering the amount embezzled by his son. Respondent has contended that the money thus paid to J. L. Michaud was always remitted to appellant's agent, the Bank of Montreal. It is possible but it is equally positive that such moneys, so received, were never employed to pay the freight due by Beaulieu. The amount due by Beaulieu had been entered, long months after its receipt by Michaud in the cash book, and long after Michaud had already used it to cover his son's embezzlements. If at any time any part of the sum due by Beaulieu for freight was paid to appellant,

and it is not proved that such was the case, it was paid with moneys subsequently received by said J. L. Michaud, who, in the end, found himself confronted with a deficit of \$900. For these reasons, I am of the opinion that there is error in the judgment rendered by the Superior Court, and that the appeal should be maintained, and appellant's action be also maintained with costs against respondent in both Courts.

QUEBEC.

NOVEMBER 2ND, 1908.

COURT OF KING'S BENCH (APPEAL SIDE).

SCOTT v. HYDE.

Company Law—Foreign Company—Winding-up Order—Jurisdiction of Superior Court of Quebec.

Coram, SIR H. T. TASCHEREAU, C.J., BLANCHET, LAVERGNE, CROSS and DEMERS, *ad hoc*, JJ.

Appeal from the judgment of the Superior Court, Montreal, LYNCH, J., rendered the 5th June, 1908. This was an opposition whereby the appellant, a shareholder of The Great Northern Construction Company, asked for the setting aside of a winding-up order against the company. It is alleged, *inter alia*, by the appellant in his opposition that The Great Northern Construction Company was incorporated under the laws of the State of West Virginia, its head office to be in New York city, and its object was to construct a railway in the province and a bridge across the Ottawa river to connect the railway with the province of Ontario. The winding-up order was made upon the petition of Ross, et al., who had undertaken the actual work of construction and who claimed to be creditors for a balance of the price of such work, but whose claim was contested by the company. The grounds set forth in appellant's opposition, and urged upon this appeal, are, in substance, the following:

1. That the Superior Court was without jurisdiction to make the winding-up order; and

2. That the winding-up proceedings were a fraudulent abuse of judicial procedure.

Respondent demurred to appellant's opposition on the grounds that the appellant being merely a shareholder did not shew sufficient legal interest to attack the winding-up order and that the winding-up order made against the company was final and conclusive as to its shareholders. Respondent also produced an answer to the effect that the company had done business in this province, that the debt now in dispute had arisen in this province, that the petition for winding up had been contested by the company and such contestation had been determined and that appellant could not reopen the issue. The Superior Court held the inscription in law to be well founded and the opposition was dismissed.

BLANCHET, J., dissenting, said the company had ceased doing business in the province about 1901, long before the service of the petition for winding up, and consequently section 6 of chapter 144, R. S. C., 1906, "The Winding-Up Act," which is clear and positive and precise, should be applied and the petition dismissed. The fact that an unauthorized firm of lawyers appeared for the company and that the appellant is a shareholder in the company can have no weight in deciding the main issue. I am of the opinion that the appeal should be allowed, with costs.

The judgment of the majority of the Court was rendered by

CROSS, J.:—The Winding-Up Act applies to "incorporated trading companies doing business in Canada wheresoever incorporated," and "which are insolvent." The evidence shows the company in question did business in Canada, although four or five years elapsed between the cessation of business and the service of the winding-up petition. The Winding-Up Act was in force when the work was done. Although sometimes worded in the present tense, their provisions apply to states of affairs which no longer exist at the time at which proceedings may happen to be taken. Accordingly, I would say, that the provisions of winding up apply to companies after their business has been discontinued if there be unsatisfied obligations. Otherwise, a company could avoid winding-up proceedings by proving that it had closed its office or factory a month before service of the petition.

It is the time of the doing of the business and not the time of the petition which is to be looked at to see if the Winding-Up Act can be applied. The company in question, therefore, was one against which the proceedings in question could be taken. Further, the liquidator was legally appointed, after due and legal notice to all interested parties, and appellant, as a shareholder, received the same notices as all the other shareholders. There is no proof of record of the abuse of the present proceedings, no proof of bad faith, or of wrongdoing, towards appellant. Besides, the fact that proceedings have been instituted before the Courts of appellants' domicile is a presumption that he will have a remedy for any wrongdoing which may be attempted against him. It was not necessary, either, for the proceedings here to be suspended, from considerations of country, inasmuch as the company's main undertaking was carried on in this province and appears to have rendered the company indifferent as to whether or not there should be any winding up in the United States. The majority of this Court is of opinion to dismiss the appeal and confirm the judgment of the Superior Court, with costs.

QUEBEC.

NOVEMBER 2ND, 1908.

COURT OF KING'S BENCH (APPEAL SIDE).

HOCHELAGA BANK v. RICHARD.

Coram, TASCHEREAU, C.J., BLANCHET, TRENHOLME, LAVERGNE, and CROSS, JJ.

Bills and Notes — Partnership — Insolvency of Firm—Dividend—Evidence.

Appeal from the judgment of the Superior Court, Montreal. The appellant sued respondent upon eight promissory notes forming a total sum of \$1,769.71, upon which \$309.71 had been paid, leaving a balance due of \$1,460. The notes had been signed with the firm name of "La Librairie Ville-Marie," composed of Louis Gustave Derome and Louis Joseph Arthur Richard, the respondent. The firm assigned the 24th of April, 1902, a curator was appointed and the bank's claim,

founded upon the said notes, was concurred in in the statement of assets and liabilities of the insolvents. A first dividend of 10 per cent. was paid the bank the 28th of July, 1902, and a further dividend of 6½ per cent. the 12th of October, 1903. The notes in question had become due on the following dates in 1902; 6th, 25th and 28th April; 5th May; 7th and 25th June; 5th December. The action was served on the 27th June, 1907, and, at first sight, it would appear that prescription was then acquired as to all the notes excepting the one due the 5th December, but the bank alleges the insolvency, the acknowledgment of the debt in the statement of assets and liabilities and the payment of the dividends as so many causes of interruption of prescription. The respondent, sued jointly and severally with his former partner, confessed judgment for the sum of \$150, the amount of the note not outlawed, and contested the action for the surplus, alleging that prescription had not been interrupted by the insolvency, nor by the statement of assets and liabilities, and that, in any event, the alleged payments on account were illegal and not authorized, and in no way had they interrupted prescription. The payment of the dividends is not denied, nor is it denied that they were made upon claim as filed by the bank. As a matter of fact, paragraph 11 of the declaration alleging such payments on account of the amount of the debt in question in this case is not denied by the plea and is consequently to be considered as admitted. Prescription was also pleaded by means of an inscription in law, which was dismissed, in view of the sufficiency of the allegations of the declaration, but, on the merits, the Court of first instance maintained the plea, declared prescription to be acquired and maintained the confession of judgment of the defendant Richard, the decision of the lower Court being based upon the want of a writing fulfilling the requirements of article 1235, C. C., and which it considered necessary before parole evidence could be admitted to prove the payments of the dividends, and the judgment of the Superior Court was further based upon articles 2260 and 2262, C. C. The action was dismissed, with costs.

In rendering the unanimous decision of the Court, the Chief Justice was of the opinion that appellant had made the best proof possible. The dividends were acknowledged to have been paid. And as the record containing the insolvency proceedings had been accidentally destroyed, the only way possible to prove the payment of the dividends was by the

curator's books. In face of the plea, this proof was even unnecessary. It is indisputable that the payments made by the curator to an insolvent estate are virtually payments made by the insolvent himself, and they interrupt prescription (*Desmarteau v. Darling*, 12 S. C. 212; *Carter v. McLean*, 20 S. C. 395; *Boulet v. Metayer*, 23 S. C. 289). In one solitary case, *Desrosiers v. Brill*, 7 P. R. 365, has the contrary been held, and, this decision seems contrary to doctrine and cannot direct us now.

Proceedings in insolvency are judicial proceedings, carried on under the supervision of the Courts, by the officers of the Court. From the abandonment to the final liquidation everything is done judicially. The payment of dividends is particularly a judicial act. If, without opposition on his part, he allows the dividend to be paid he thereby ratifies and confirms all the payments made to the creditors. But article 2224 C.C. recognizes every judicial demand as an interruption of prescription, and a creditor's claim upon an insolvent estate is a judicial demand. If the claim is recognized in the insolvent's statement of assets and liabilities, nothing further is required; it is the equivalent of a confession of judgment by the debtor and it creates an interruption of prescription. If a dividend is subsequently paid to the creditor, such payment necessarily presumes consent on the part of the debtor who has not only admitted the claim from the outset, but who has permitted the payment of dividends to pass unchallenged.

It, therefore, becomes unnecessary for us to consider the question of the legality of the proof, a proof which was even superfluous inasmuch as the payments by the curator were not denied, nor is it necessary to consider whether the claim originally filed by the bank against the estate is identical with the one now of record, the identity not being denied in the plea. It becomes our duty, therefore, to decide but one of the four questions raised by respondent in his factum, namely: does the payment of a dividend by the curator to an insolvent estate interrupt the prescription running in favor of the insolvent? This Court is unanimously of the opinion that this question can only be answered in the affirmative, that there was an interruption of prescription in the present case, and, consequently, that the judgment appealed from, which in part dismissed the action, must be reversed in its entirety, with costs in both Courts against respondent.

NOVA SCOTIA.

IN THE SUPREME COURT.

GRAHAM, E.J., AT CHAMBERS.

NOVEMBER 10TH.

IRVINE v. HERVEY ET AL.

*Partnership — Insolvency—Receiver—Assets—Distribution—
Notice to Creditors.*

H. B. Stairs, for plaintiff.

H. Mellish, K.C., for defendant.

The rule is well established that where the assets of a partnership are in the hands of a court of equity for distribution to the parties entitled, such assets must be first applied to the payment of the firm creditors before any portion can be applied to the claims of the individual partners of their creditors. 22 Am. & Eng. Ency. 192.

In the decree in this case I directed an enquiry in respect to the individual creditors, viz.: (g) "As to claims against the plaintiff and the said Robert G. Hervey and Hervey Trust and Guarantee Company Limited, and the respective amounts due thereon."

There is a fund in the control of the Court, in fact in the hands of a receiver, and it is quite possible that there will be a surplus after paying the firm creditors. One of the parties, if not both, is insolvent and the other resides out of the jurisdiction.

An application has been made to me to settle the advertisement to bring in creditors and an objection is raised to any advertisement for the separate creditors not connected with the project of the co-partnership. I think that they should be notified in the advertisement to come in. The surplus of the fund should not, under the circumstances, be distributed to these partners before the several creditors, at least those within the jurisdiction, have had the opportunity of obtaining a remedy against this fund. Being in custody of the Court they are now deprived of their ordinary remedies.

Moreover in the circumstances of this particular case, which are very much out of the ordinary circumstances of

any case, it may be desirable that a representative of the individual creditors should be heard before the Referee on the contestation of the joint claims.

I think the advertisement should embrace those creditors contemplated in the decree.

QUEBEC.

COURT OF REVIEW.

NOVEMBER 14TH, 1908.

BEAUDOIN v. CHARRUAN.

CHARRUAN v. FEDERAL LIFE ASSURANCE COMPANY.

Life Insurance—Agent—Authority — Premium—Promissory Note Payable to Agent—Personal Receipt—Liability of Company.

In review of a judgment of the Superior Court, Montreal, CURRAN, J., rendered the 26th September, 1907 (4 E. L. R. 60.)

Action taken by plaintiff in warranty to indemnify them for whatever they may be called upon to pay by reason of the action of the principal plaintiff. Plaintiffs in warranty insured themselves with the defendant in warranty, at the solicitation of one of the latter's agents, and gave the agent a note to his order in payment of the first premium. The agent illegally transferred the note to plaintiff, who, when it became due, sued defendants. In calling upon defendant in warranty, the plaintiffs in warranty alleged that the custom in Montreal is for agents of insurance companies to collect the first premium, and the company knew the agent had been soliciting the insurance and the company gave the agent instructions to collect the first premium on the signing of the application. The plea was a denial of the agent's authority to collect the first premium, especially when no policy was issued, as in this case; further, the note was signed by plaintiffs in warranty at their own risk; finally, a denial of any custom in Montreal whereby agents received the first premium, which custom, even if it did exist, could have no force in the present case since no policy was ever issued.

The Superior Court dismissed the action in warranty under the well established doctrine that the authority of a general agent is restricted to the range of his employment and to the acts and representations which a prudent and ordinarily sagacious and experienced person might expect him to do or to be authorized to make in respect to the particular business entrusted to him, and that this rule applies a fortiori to sub-agents, and the Court cited *Manufacturers Accident Insurance Company v. Pudsey*, 27 S. C. R. 379. The Court further found that Daoust, one of the plaintiffs in warranty, is an experienced person, having been engaged in the insurance business as a sub-agent and that he must have known that when he gave said promissory note to the agent, payable to the agent's order, regardless of the company defendant in warranty, without any qualification of said agent as agent or otherwise of said defendant in warranty, he was acting in a grossly imprudent manner, and gave the note at his own risk and that the company was in no way bound thereby. The Court also found that as sub-agent of the company, said agent had no authority to take a promissory note, made payable to his own order, in anticipation, as payment of the first premium on a policy of insurance not yet issued and on a simple application for the issuance of such policy. The majority of the Court of Review (Bruneau, J., dissenting), was of the opinion that the judgment of the Superior Court, for the reasons therein stated, was right and confirmed it, with costs in both Courts.

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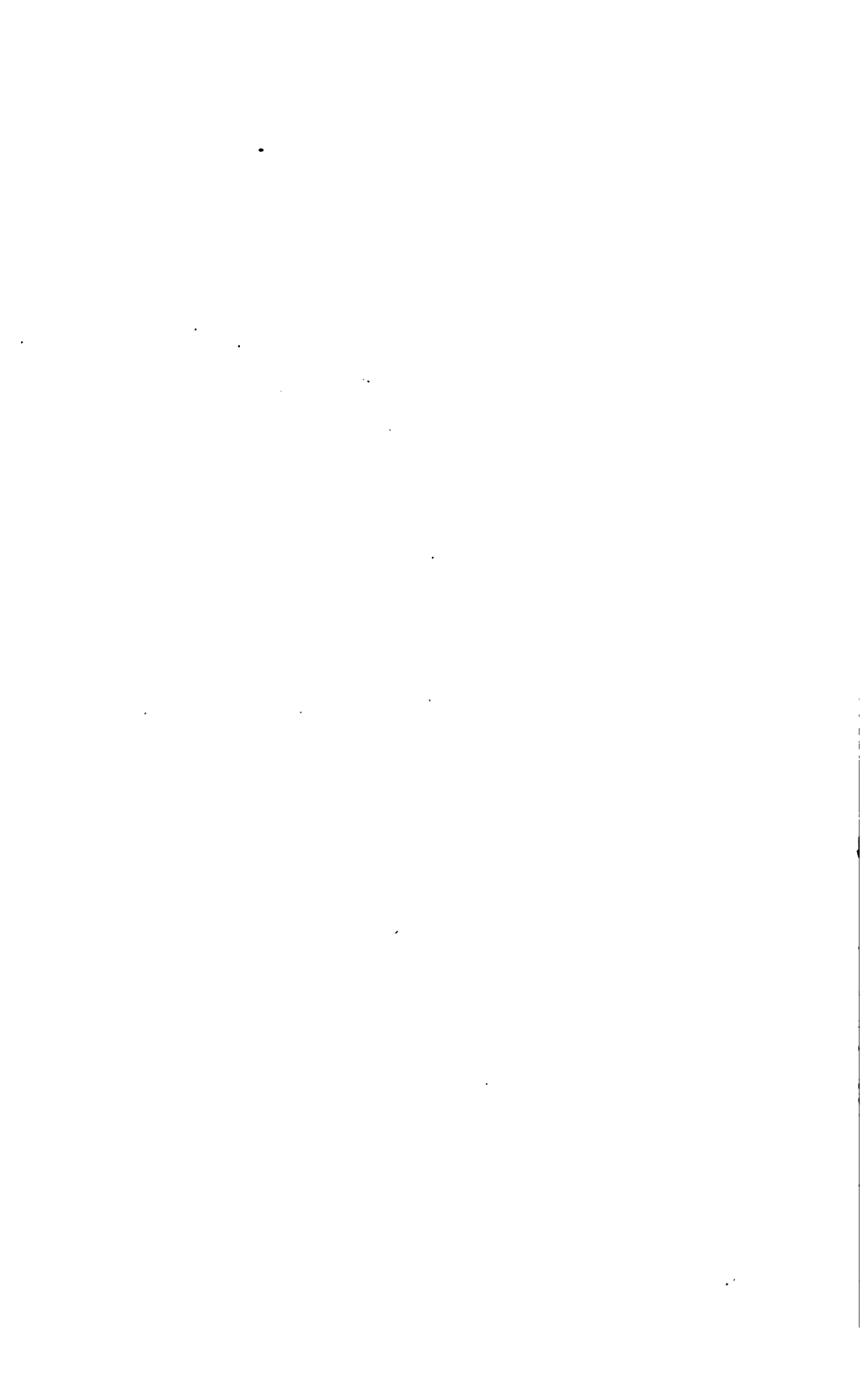
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